DOCUMENT RESUME

ED 255 790 CG 018 122

TITLE Preventive Detention of Juveniles. Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary. United States Senate, Ninety-Eighth Congress, Second Session. Oversight Hearing to Review the Recent Supreme Court Decision Relating to the Pretrial Detention of Juvenile Offenders. Serial No. J-98-145.

INSTITUTION Congress of the U.S., Washington, D.C. Senate Committee on the Judiciary.

REPORT NO Senate-Hrg-98-1135

PUB DATE 19 Jun 84

NOTE 60p.; Some pages are marginally legible due to small print.

PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.

DESCRIPTORS *Childrens Rights; *Crime Prevention; *Delinquency; *Due Process; Hearings; *Juvenile Courts

IDENTIFIERS Congress 98th; Detention; *Juvenile Justice System; New York; *Schall v Martin; Supreme Court

ABSTRACT

This document contains prepared statements and witness testimony from the Congressional hearing on the pretrial detention of juveniles. The opening statement of Senator Arlen Specter, subcommittee chairman, is presented, focusing on the concerns arising from the Supreme Court decision in the case of Schall versus Martin (New York) which supports the constitutionality of preventive detention for juveniles. Testimony is presented from Martin Guggenheim, New York University Law School; Lenore Gittis, Attorney-in-Charge, Juvenile Rights Division, New York Legal Aid Society and Janet Fink, Assistant Attorney-in-Charge; Richard Lewis, District Attorney, Dauphin County, Pennsylvania; the Honorable Margaret Driscoll, Superior Court Judge, Bridgeport, Connecticut; Larry Schall, Juvenile Law Center, Philadelphia and Dolores Lee, Philadelphia; and Eric Warner, Juvenile Offense Bureau, Office of the Bronx District Attorney. Topics covered include the lack of adequate, appropriate facilities for detaining juveniles, the principle of the presumption of innocence, due process protection, and implications of the Schall decision for future social policy. (MCF)

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S. HRG. 98-1135

PREVENTIVE DETENTION OF JUVENILES

ED255790

HEARING

BEFORE THE

SUBCOMMITTEE ON JUVENILE JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

OVERSIGHT HEARING TO REVIEW THE RECENT SUPREME COURT DECISION RELATING TO THE PRETRIAL DETENTION OF JUVENILE OFFENDERS

JUNE 19, 1984

Serial No. J-98-145

Printed for the use of the Committee on the Judiciary

CG 018122

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PREVENTIVE DETENTION OF JUVENILES

TUESDAY, JUNE 19, 1984

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 562, Dirksen Senate Office Building, Hon. Arlen Specter (chairman of the subcommittee) presiding.

Staff present: Mary Louise Westmoreland, chief counsel; Scott Wallace, counsel; Bruce King, counsel; and Tracey McGee; chief clerk.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON JUVENILE JUSTICE

Senator SPECTER. Good morning. This hearing of the Juvenile Justice Subcommittee will convene.

Today we will consider implications of the decision of the Supreme Court of the United States in *Schall* v. *Martin* which was handed down 2 weeks ago yesterday, on June 4, concerning the question of preventative detention of juveniles pursuant to a New York statute.

The scope of this hearing is under the authority of the Congress to legislate under article V of the 14th amendment on due process issues.

The concerns which we will address relate to the underlying facts of *Schall*, where juveniles were detained on offenses ranging from enticing others to gamble, to first degree robbery. A number of the class involved were first time offenders, and according to the facts presented to me, the vast majority of those detained were placed on—majority—or their cases were ultimately dismissed.

The court of appeals for the second circuit held that New York law violated due process, because the statute was administered in such a way that the detention period served a punitive purpose, where the juveniles had never ever been adjudicated as delinquents.

The whole issue of juvenile detention is important because of the presumption of innocence which is attached to everyone prior to conviction. Wherever preventative detention is used, it has to be very solidly based, and that is an issue that has been debated extensively in the Federal Crime Control Act in the District of Columbia where there is limited pretrial detention that has special implications and concerns when used for juveniles.

(1)

The Supreme Court in reaching its decision stressed the States' interest in protecting the child from future criminality. That raises a fundamental concern, at least on my part, as to how protection from future criminality is to be obtained from the experience that I have seen, incarceration where juveniles are held in detention with others is one of the best breeding grounds, and educational spots for future criminality.

The courts said that—the Supreme Court said that juveniles, unlike adults, are always in some form of custody. An underlying factual consideration, which in my judgment, at least, is in very substantial doubt. This decision is a very important one, it has far reaching implications, and it is a matter which we felt this subcommittee ought to review at the earliest possible moment, so we are holding these hearings at this time.

Our first panel consists of Professor Martin Guggenheim and Attorney Lenore Gittis. If you two would step forward, we would hear you at this time.

Professor Guggenheim is professor of law from New York University Law School and argued the case on behalf of the juveniles, and Ms. Gittis, Attorney-in-Charge of Juvenile Rights Division, New York Legal Aid Society.

Welcome, Professor Guggenheim. We will begin with you.

STATEMENTS OF A PANEL CONSISTING OF MARTIN GUGGENHEIM, PROFESSOR OF LAW, NEW YORK UNIVERSITY LAW SCHOOL, NEW YORK, NY; LENORE GITTIS, ATTORNEY-IN-CHARGE, JUVENILE RIGHTS DIVISION, NEW YORK LEGAL AID SOCIETY, NEW YORK, NY, ACCOMPANIED BY JANET FINK, ASSISTANT ATTORNEY-IN-CHARGE

Mr. GUGGENHEIM. Thank you, Senator Specter. It is a pleasure to be here this morning, and to attempt to push forward the efforts that we have pressed for the last 12 years in the courts, to try to find a solution to an unfortunate problem throughout the United States in juvenile justice, which is a shockingly, and I might add, a ridiculously high rate of detention of juveniles upon arrest.

Although on other occasions this body and others in the Congress have been concerned with the conditions in which juveniles are placed, after being removed from their homes, and although I agree with your remarks at the commencement of these hearings, to the effect that these facilities constitute breeding grounds, and also often subject children themselves to, as victims of crime, through abuses in these facilities, I think the appropriate focus, in an attempt to find a solution at the national level, at this time should not be on how to render these facilities more benign, but how to eliminate needless detention in the first place.

There is overwhelming evidence to show that the situation in New York is mirrored throughout this country. At least eight juveniles are deprived of their liberty before they are proven guilty, while they are cloaked with the presumption of innocence, for every one child is placed out of his or her home after a conviction or adjudication.

Juvenile justice has resided in Alice's Wonderland since its inception. If ever there is a justification for incarceration before trial,

it must be accompanied by a compelling State interest. There simply is no compelling State interest in depriving a young person of his or her liberty under the punitive purpose of protecting the community from predators, when that person is found to be sufficiently safe for release within several weeks.

I am proud of the effort that we have waged in an attempt to correct this terrible policy, not only because I believe that this policy is unconstitutional, but because I believe that by changing it we can begin to improve juvenile justice.

Senator SPECTER. Professor Guggenheim, the Supreme Court has said that it is constitutional.

Now, notwithstanding your view, or perhaps mine, where do we go from here?

What would you suggest that the Congress do to fashion procedures where there can be protection of the juveniles' constitutional rights, by statute, of course?

Mr. GUGGENHEIM. The area to begin looking into is to circumscribe the capacity to detain a juvenile on the basis of protecting the community from crime. By targeting and limiting those eligible for detention on that basis, to those who are accused of serious offenses.

Senator SPECTER. Would you suggest a prompt hearing after the arrest?

Mr. GUGGENHEIM. Pardon me?

Senator SPECTER. Would you suggest a prompt hearing after arrest, to make a factual determination as to whom should be targeted?

Mr. GUGGENHEIM. Well, I think that what we need are guidelines, or statutes that limit those eligible for detention. The hearings after arrest do occur, but they occur now——

Senator SPECTER. How long after arrest?

Mr. GUGGENHEIM. Well, in New York, for example, relatively immediately. There is the next court date. The next date that the court is in session.

Senator SPECTER. What does that mean?

Mr. GUGGENHEIM. If it is other than on a weekend, it would be the next morning. They would spend one night.

Senator SPECTER. One night in jail, and the next morning a judicial officer makes a determination as to the nature of the charge, the background?

Mr. GUGGENHEIM. Yes.

Senator SPECTER. And a decision as to whether there would be further detention?

Mr. GUGGENHEIM. Yes, but as Justice Marshall found in dissent, the decision process itself is nonetheless a parody, and the problem is not, in my opinion, to look at trying to speed up procedural protections, but to deal with substantive limitations, to say, for example, that one is ineligible for consideration for preventative detention because of the absence of a sufficient compelling State interest.

Senator SPECTER. If a judge, the day after finds that somebody is guilty of gaming, or enticing somebody else to gamble, as the facts apparently were in this case, is it a matter of practice for that judicial officer to maintain the custody of that child?

Mr. GUGGENHEIM. Well, the judge does not find that the person committed the crime of which he is accused, but only that there is a petition pending on that act.

Senator SPECTER. I understand that, but it is a petition for gaming.

Are you saying to me that when these hearings occur the next day, some juvenile is charged with gambling, or inducing others to gamble, that that juvenile is retained in preventative detention?

Mr. GUGGENHEIM. May be. I would suggest, and guess that most are not.

Senator SPECTER. Professor Guggenheim, never mind maybe or guesses. What do we know?

Mr. GUGGENHEIM. Yes, the record in this case, in *Schall* itself, demonstrates——

Senator SPECTER. Do you know of juveniles who were so preventatively detained, that were charged with offenses of enticing others to game?

Mr. GUGGENHEIM. Certainly. Not only that——

Senator SPECTER. Many?

Mr. GUGGENHEIM. Well, let me broaden the answer.

We have shown in this record that 51 percent of the juveniles detained in New York State were accused of offenses no higher than misdemeanors, generally.

Now, then we could look more at categories within that——

Senator SPECTER. As to misdemeanors, some of those are serious.

Mr. GUGGENHEIM. Most of those are not, and I might argue all of those are not, when we are talking about the purpose of detention to prevent crime for a relatively short period of time.

Senator SPECTER. What is the most serious misdemeanor under New York law?

Mr. GUGGENHEIM. Well, by definition, it is eligible for jail for no more than one year. That is the distinction between felonies and misdemeanors.

Now, burglary in the third—well, I am not sure. I do admit that there are some——

Senator SPECTER. Assault with a deadly weapon?

Mr. GUGGENHEIM. No, that is a felony. That is a very high——

Senator SPECTER. Aggravated assault?

Mr. GUGGENHEIM. That is also a felony. Only simple assault, punching somebody, or kicking somebody, with no intent to produce bodily harm, is a misdemeanor, the highest misdemeanor.

Senator SPECTER. Does the Congress have the authority under article V of the 14th amendment to define constitutional rights in this regard?

Mr. GUGGENHEIM. I believe that the Congress does, and I would analogize this problem to the status offense problem that Congress has dealt with since 1974.

Senator SPECTER. We had substantial testimony last week from Director Alfred Regnery that the Congress has no authority to legislate under article V of the 14th amendment.

Mr. GUGGENHEIM. I understand that, and plainly this issue arises in this context. I do believe Congress has that power, and I do believe Congress should exercise that power.

I think that we waste a great deal of money, and we harm kids to boot, and most important of all, and finally, we do not protect society.

Senator SPECTER. Professor Guggenheim, it would be very helpful to this subcommittee if you could provide us a more detailed, factual analysis as to what happened in your case.

My own instinct is that you are correct, that it is painting with a vastly overbroad brush in what is being done on this detention, if the facts support the assertion of the juveniles on relatively minor charges are detained for protracted periods of time.

It would be very helpful in structuring a remedy to have those hard facts at hand, such as the group in your case, because that is the focus of attention.

How many juveniles are involved, how many were detained on specific minor offenses, particularizing the offenses, how long they were detained, and what were the circumstances of their detention? That is, what kind of secure facilities were they detained in?

And I do not suppose you could go beyond establishing a causal connection between that kind of detention later and criminal conduct, to the extent—or perhaps you could.

But to the extent that that could be established, it would be even more persuasive.

Mr. GUGGENHEIM. Well, I am not sure that that could be established. I would be delighted and privileged to provide the committee with the information you have just asked for, but I would also suggest that commentators, including the Supreme Court, have criticized juvenile justice for many years for its failure to impact successfully on the recidivism rate.

I look to this policy and practice as the most important mistake that juvenile courts indulge in, in breeding and in continuing crime spiraling, rather than reducing it.

Senator SPECTER. Do you know of any empirical evidence that detention of juveniles does breed crime?

My own experience leads me to that conclusion, but is there any empirical evidence, to your knowledge?

Mr. GUGGENHEIM. None that I could think of, or cite at this moment.

Senator SPECTER. If you could find some, it would be helpful.

What happens in the Senate Judiciary Committee, and in the Senate and the Congress is that when ideas are advanced along this line, like Senate bill 520, or 522, which we had hearings on last week, to separate out status offenders, or juveniles accused of crime, or adults accused of crime, there is an immediate question, why should that not be left to the States.

Essentially what the Supreme Court held here. So that to the extent that there is hard, factual material, then it is a matter where those of us who have this sense of change, and a compelling change, by Federal requirement, can make a case which would overcome the inclination of many in the Congress to stand by States' rights, and leave it up to the States to decide how to handle these specific problems.

So that is the kind of factual information we really need.

Mr. GUGGENHEIM. Fine

Senator SPECTER. Ms. Gittis, what do you think about this?

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Professor Guggenheim, your full testimony will be included in the record, and so will yours, Ms. Gittis.

[The prepared statement of Mr. Guggenheim follows:]

PREPARED STATEMENT OF MARTIN GUGGENHEIM

Thank you very much for the opportunity to appear before you today to testify on the important topic of the pre-trial detention of juveniles. It is a subject of particular significance to me, having spent the past fourteen years challenging in the state and federal courts the detention practices of juveniles in New York State leading ultimately to the Supreme Court decision two weeks ago in Schall v. Martin which upheld the constitutionality of New York's scheme and which served as a catalyst for these hearings today.

I am especially glad to have the opportunity to press forward through other channels after so disasterous an opinion as the one written by Justice Rhenquist for the Court. And since I am not now in a court of law, I am particularly pleased to be able to shift my focus somewhat from constitutional analysis to policy. Please don't misunderstand me, I remain convinced that New York's preventive detention scheme, and others like it, offend basic precepts of American constisutional law. The case against the New York statute upheld by the Supreme Court is powerful. Only by invoking atavistic notions which denigrate the liberty interest of juveniles to such a low level was the Supreme Court able to push back the constitutional challenge advanced. Comparing the custody of one's parents with the custody of the jail's warden signals a substantial retreat from the Court's commitment in In re Gault in 1967 to "candidly appraise" the juvenile justice system and to respect the principle the neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

Nonetheless, it is inappropriate to relitigate the decision in Schall in these halls and I come before you today not to raise the constitutional defects inherent in preventive detention but to discuss why Congress should be concerned about laws like New York's and why these laws must be altered if we ever expect juvenile justice to work. This pleases me because, although the constitutional case against these laws is powerful, the policy case is overwhelming. The worst aspect of these laws is perhaps not that they inflict a wrongful deprivation of liberty on children, but that they are wasteful and harmful to all of society.

Simply put, juvenile justice has always resided in Alice's Wonderland and the worst features of the system have always been the policy of locking kids up upon arrest in ridiculously high numbers. In juvenile justice, juveniles accused of criminal misbehavior are deprived of their liberty while they are cloaked with the presemption of innocence; once the presumption is overcome and they are adjudicated guilty of wrongdoing, however, they are released back to their homes.

On one level, this netherworld of justice could not appear to be more absurd. Let me briefly try to explain why the process operates as it does; what is wrong with it; and what could be done to improve it.

WHY THE SYSTEM OPERATES AS IT DOES.

Juvenile justice is premised in its most basic component on the ideal of individualized justice. For each child who comes into the system, the judge is supposed to correct any deficiencies in the child which may have caused or explain his misbehavior. For each child, the court is expected to develop an individualized treatment plan which best serves the needs and best interests of the child. Though there is always an eye

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toward community protection, such concerns are essentially peripheral to the primary object of the court's attention - the child. Serving the child's best interests which are consistent with the least restrictive alternative is the primary objective of the system. On the other hand, though community protection and punishment have rarely been frankly embraced as legitimate objectives of juvenile justice, judges have never refused to punish children who come before them or to attempt to ensure that the community will be protected in an appropriate manner.

How is it possible to serve both masters at once? Particularly when judges are enjoined not to punish and to take only the child's best interests into account in fashioning an appropriate sentence? The answer is, not with great difficulty: if juvenile courts can't punish kids after they are convicted of criminal wrongdoing, they can always be punished before their trials are held. Then after giving them a dose of punishment, and after they are formally adjudicated as delinquent, the system shifts into its best interests mode. This shift translates into leniency in sentencing, but harshness in detention.

In statistical terms, it means that about eight juveniles are detained before trial for every juvenile placed out of his home after trial. Throughout the United States, this ratio runs true. Every respected study over the last decade has proven the same thing time and again, the primary correctional response to juvenile delinquency is to lock kids up for a couple of weeks until their court case is completed and then to let them go.

In order to maximize the discretion available to each judge to do what is best for each child who comes before the court, legislatures have seen fit to authorize judges to detain any juvenile, at any time, for any reason which the judge regards as appropriate. Thus, New York's standard, which is prototypical of most states', authorizes detention whenever the judge believes that the juvenile is a serious risk of committing a crime, if released. This power is not limited by the prior record of the juvenile; it is not limited by the type of conduct which brought the juvenile before the court; it is not limited by the probability of ultimate placement. There is even no requirement of a showing that the juvenile probably committed the crime which brought him to court in the first place.

There are three principle defects which these schemes work. 1). They authorize a deprivation of liberty based on unbridled discretion. Anytime a judge feels that a child should go to jail, that is a sufficient basis to lock him up.

2). Although I do not intend to prove this or to go into this in any detail, this open-ended power virtually guarantees that an erroneous decision to detain will be made more than ten times for every correct decision. This statement requires some elaboration. Remembering that the titular purpose of the detention is crime prevention, a wrongful or erroneous detention is one in which no crime would have been committed even if the juvenile had been released. Predicting future behavior is a task which is still appropriately relegated to those who read tea leaves, but assuming some capacity for social scientists to predict future behavior in certain circumstance, the prediction effected in the short time and with the limited data available to arraignment judges, at the very best, the judge will predict falsely that a juvenile would commit a crime ten times for every one time that he will correctly make that prediction.

3). There is a total absence of balance or fairness. This broad power to detain invites and results in the deprivation of liberty of thousands of juveniles who have been accused of trivial misconduct. For example, 51% of the juveniles detained

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in New York would be ineligible for detention under the District of Columbia preventive detention law for adults. Juveniles in New York have been preventively detained for stealing a pair of shorts from a department store or for playing a game of three-card monte on the street. The complete absense of a sense of proportionality is striking.

WHAT IS WRONG WITH THE SYSTEM AS IT OPERATES.

The problems attendant with the system as I have just described it are obvious. It's both much too easy to get locked up before trial, on the one hand, and, perhaps, too difficult after trial, on the other. The system is grossly imbalanced. This imbalance does more than offend the sensibilities of thoughtful and concerned observers. It is unnecessary, unwise and, extremely counter-productive. It teaches young people precisely the wrong message. And, if I may be so bold as to suggest it, it is responsible for the high rate of recidivism which occurs among juveniles.

At least since the Supreme Court's decision in In re Gault in 1967, courts and commentators have lamented juvenile justice's failure to reduce recidivism or, indeed, even to do a better job at controlling or reducing crime than their adult counterparts. It is my opinion that the combined effects of detention and sentencing practices of juvenile courts is primarily responsible for this high rate of recidivism. These practices teach kids several things at once. The first, and perhaps most important hidden message is a disrespect for law and for their rights which the court's work even youths of tender age can appreciate the notion of the presumption of innocence. Being punished before one has one's day in court is perceived by those punished to be as unfair as it actually is. Second, and perhaps paradoxically, this regimen of punishment before trial combined with release after conviction is frequently perceived by the juveniles affected as an unduly lenient system in which doing the crime is often worth doing the time.

Even if kids are able to appreciate the principle that punishment should not precede proof of guilt, they are not so sophisticated as to be able to appreciate the fine distinction juvenile courts work between pre- and post-adjudicative deprivations of liberty. To the unsophisticated youth, the pre-trial punishment of a few weeks in jail was their sentence. The two years period of probation is overlooked.

The decision to detain before trial is an important one in any criminal justice system. The time between arraignment and trial has been recognized by the Supreme Court as perhaps the most important period of the proceedings when the accused needs to consult with his attorney and assist in the preparation of the defense. Wrongful detention of juveniles is even more damaging than wrongful detention of adults. Incarceration has the potential to traumatize children and to teach them the ways of crime. Children in detention are regularly exposed to juveniles already convicted of crime and awaiting sentence. Juveniles in pre-trial detention are also subject to placement in jails with adult offenders. Detention can cause difficulties with school. It also increases the likelihood that the accused will be convicted.

WHAT COULD BE DONE TO IMPROVE THE SYSTEM.

Although I believe that a powerful case can be made that preventive detention is unconstitutional under all circumstances, I prefer to advocate a solution to the problem confronting juvenile justice which is less radical than the total eradication of preventive detention. I fully recognize society's legitimate interest in protecting itself from serious criminal conduct.

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Along with the American Bar Association however, there are certain uses of detention that should plainly be prohibited. Detention should never be used a) to punish, treat, or rehabilitate, b) to allow parents to avoid their legal responsibility, c) to satisfy demands by the victim, police or community, d) to permit more convenient access to the juvenile, e) to facilitate further investigation or f) due to a lack of a more appropriate facility.

Without advocating that detention to protect the community is prohibited, the least that can be required is that states target those individuals about whom society is justifiably concerned -- juveniles who are charged with a crime of violence, who have a record of past involvement in serious crime and who are likely to have as their ultimate sentence commitment to a secure facility. Accepting the proposition that society may rightly reduce the likelihood that juveniles may inflict serious bodily harm during the period from their arrest to final sentence, is no excuse for the open-ended power to detain preventively now authorized in New York and elsewhere. Though society has an interest, arguably even a compelling one, to prevent serious or violent crime, when detention is authorized to prevent trivial crime the state has gone too far. Any exception to the general rule that incarceration follow, rather that precede, adjudication of guilt can be justified, if at all, by a compelling state interest.

No system authorizing the deprivation of liberty can be acceptable unless it meets three minimal preconditions: 1)it must have precisely drawn objective standards; 2) it must be limited to situations involving a very serious risk of harm to society; and 3) it must provide procedural protections designed to assure the accuracy of the conclusion that detention is necessary.

The plain facts are that in New York a very large number of juveniles are detainerd pre-trial; the majority of those deatined are accused of no more than minor, petty offenses; the detention is not related to any legitimate purpose; the detention is in abominable conditions; and the great majority of those deatined could be safely released to thier homes. These unfortunate facts are replicated throughout the United States each day.

Between 15,000 and 20,000 children are in jail each day in this country; nearly 1,000,000 children are jailed each year. This is the primary correctional response to juvenile crime. It is done to show that the court means business. Yet, paradoxically, there is room to believe that this peculiar ordering of punishment results in contributing to recidivism, rather than its elimination. There simply is no value in detention as a deterrent. There are no special benefits to the juveniles. Instead, there are only costs, both to society and to the children affected. In the short run, money is wasted. In the long run, I fear thispolicy contributes to crime and to the ruination of some of our youth.

The unbridled discretion to detain juveniles upon arrest, even for first and trivial offenses, should be circumscribed. I believe, along with the American Bar Association, that as juvenile courts operate in this country, the danger of too much detention before trial currently outweighs the danger -- both for juveniles and society -- of too much release.

I sincerely hope that these remarks are of some some value to this committee and, once again, I appreciate the opportunity of presenting them to you.

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STATEMENT OF LENORE GITTIS

Ms. GITTIS. First, Senator Specter, I do wish to state that I am accompanied by Janet Fink, the assistant attorney-in-charge of our division; who litigated the *Martin* case from its inception along with Professor Guggenheim. I asked her to accompany me today.

Senator SPECTER. It is nice to have that company.

On which side are you in, and on which side is she?

Ms. GITTIS. We are on the same side, otherwise she would be fired.

Senator SPECTER. Proceed, please.

Ms. GITTIS. You asked what I thought about the issues you were just discussing with Professor Guggenheim, that is, the matter of empirical evidence on the role of detention in breeding crime, and I will say that we will also address ourselves to evidence that we could make available to you.

I think that we all know that there is a vast body of literature going back into the 1960's, talking about the dangers of detention and incarceration of children.

There was a phrase that I used in testifying before this committee in 1977, that came from one of those studies, that these detention facilities and placement facilities, teach muggers to be rapists, and teach rapists to be murderers, and they do.

Senator SPECTER. There is a vast body of literature, but how much empirical evidence?

Ms. GITTIS. We will do a search of that. I understand the problem, I understand that there was a good bit of empirical evidence that supported the original passage of the Juvenile Justice Act and its deinstitutionalization provision. So we will provide you with that.

Now, you have said, and I think that is so, that the Supreme Court has spoken that preventive detention for juveniles is the law of the land and it is probably pointless to say again that we disagree. We argued this case all the way through the courts.

However, I think it is important to make one point that Professor Guggenheim started making. The juvenile court system is under assault in this country. The critics of it say it is a failure, it does not prevent recidivism; it does not prevent crime.

I think we ought to start with the baseline. It is a court of law. It is designed to deal with the needs of children. It is also designed to protect the community, but it cannot deal with the vast social problems that impact upon the families of the children that come before the court. I think if we just look on the court as a court with a specific mandate, we would have a fair way of determining whether it is a success or failure, of determining at least whether it is doing its job in a respectable fashion.

Now, I just do want to make a few comments on the *Martin* decision because I think it is important.

Yes, the Supreme Court has spoken and, yes, the Supreme Court has spoken before. The Supreme Court had spoken in the *Plessy* v. *Ferguson* decision and overturned itself in *Brown* v. *The Board of Education*. That is not to imply that the Supreme Court will overturn——

Senator SPECTER. It only took 58 years, too.

Ms. GITTIS. Well, I am hoping that this will take a lesser time.

I only point out that the Court has spoken, yet it does not mean that *Martin* will remain the law. It may or it may not.

But in its speaking, I think the Court has done something that is very damaging to the juvenile court system. I think that what the decision has done is turn the clock back almost 20 years and left us with a fossilized monument to pre-*Gault* days.

In those days, the judges had unfettered discretion over the lives of youngsters. And based on their own value systems and prejudices, judges decided what particular acts offended them, which children should be allowed to remain at home and which ones should be placed away from home, all in the service of what they considered a benign exercise of the parens patriae doctrine.

I will not read my printed testimony, you have that for the record. But what I would like to do, since Professor Guggenheim addressed some of the basic issues, is to talk about some recommendations for the future.

We disagree with the premises of the decision and we are dubious about its promised benefits. We are making a realistic assessment of its implications for future juvenile justice policy on a national as well as State level. It must be recognized that Justice Rehnquist's decision was limited. It was limited to a holding that detention imposed nonpunitively in a juvenile detention center in order to serve the child's and the public's interests in safety was not unconstitutional. He specifically left open the possibility of individual litigation challenging particular instances of punitive detention and deferred to the legislatures the responsibility to draft statutes optimally furthering public policy. We hope that Congress as well as State legislatures in exercising that responsibility will be heedful as much to what the *Martin* decision does not do as to what it does do.

First, the decision explicitly found the detention at issue, which was in New York's Juvenile Detention Center, to be nonpunitive and consistent with the State's parens patriae interest in preserving and promoting the welfare of the child and sufficiently solicitous of the juvenile's right to counsel and other protections to comport with due process.

The decision therefore did not authorize incarceration imposed for punitive purposes, incarceration in adult jails differing sharply from the controlled environment depicted in New York or incarceration in the absence of at least the minimal protections contained in New York's recently enacted Juvenile Delinquency Procedure Code. Far from giving a blank check to localities to detain children, the decision specifically stressed the importance of notice, counsel, a timely probable cause hearing, the statement of facts and reasons supporting detention, and a mechanism for practical review in individual cases.

Moreover, the recurrent emphasis in the opinion on the State's parens patriae role as substitute custodian when parental control falters underscores the State's responsibility to insure that detention, when imposed, must be safe and humane and must further the children's best interests. If anything, the decision should provide impetus to the Federal and State Governments to step up

their efforts to eliminate the still pervasive problem of children in substandard detention facilities and adult jails.

Unfortunately, those problems have not abated, and we refer to the two bills which you have introduced in Congress, Senator, which are trying to address that problem and we very much respect the efforts——

Senator SPECTER. Are you saying that the Supreme Court decision set standards——

Ms. GITTIS. No.

Senator SPECTER [continuing]. That should be adhered to or approached by States to improve circumstances for juveniles?

Ms. GITTIS. I think the Supreme Court is not precluding setting standards. It said that it found the standard in the New York statute acceptable because the judges had to state reasons for detention decisions on the record. But it did not preclude the States, in the interest of States' rights and, I hope, in the interest of due process, from setting up their own standards.

Senator SPECTER. Well, of course not. The Supreme Court would be delighted to have the States do whatever they chose.

The question is whether the Supreme Court through its authority is going to impose minimal standards on States to uplift the State practices which they did not do here.

Ms. GITTIS. No; they did not do it. But because they did not preclude it, they left the field open for leadership to both Federal and State Governments——

Senator SPECTER. The field was open before the Supreme Court spoke in this case.

Ms. GITTIS. That is correct but juvenile justice is very young in this country, Senator. The juvenile justice system as it exists today basically dates from the *Gault* decision. That is not long ago. That is 1967.

Senator SPECTER. No; that is not so. There was a juvenile justice system long before *Gault*.

Ms. GITTIS. But not the kind that——

Senator SPECTER. Unless you want to call it the injustice system.

Ms. GITTIS. Correct.

But in the *Gault* decision for the first time the Supreme Court said that children were to be treated as human beings, particularly as individuals under the Constitution and were entitled to due process protections.

Since the *Gault* decision there has been development in both Federal and State courts as to what due process protection means within the context of a juvenile court system.

Senator SPECTER. Were the States precluded prior to *Gault* as treating juveniles as human beings?

Ms. GITTIS. No. Neither were the States precluded from providing counsel, but they did not, except for New York. And the fact is that when the Supreme Court said that children should be provided counsel, the States did provide it. That has only been since 1967.

So because the Supreme Court is now not saying that preventive detention is unconstitutional does not mean that the States cannot at the very least provide some guidelines for it. The fact is that the juvenile justice system is an evolving system, it is changing constantly.

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I will give you an example of this evolution in New York, because I think that States can balance the needs of the child and the needs of the community very well, and do so——

Senator SPECTER. Do you think the Supreme Court in this case advanced the cause of juvenile justice?

Ms. GITTIS. No, I do not. I do not. And I do not think they advanced the needs and protection interests of the community.

But I think the legislatures can do so, I think that they can balance such needs. I think that they can set standards. When I talk about the juvenile justice system being an evolving system, the example that I wanted to give you was one that happened not very long ago in 1976. The Family Court Act had been passed in New York in 1962, 5 years prior to *Gault*. It had been enacted with a provision that stated that in fashioning an appropriate order of disposition the court was to consider the needs and best interests of the child. As conditions changed, as there were problems——

Senator SPECTER. I quite agree with you that States can advance the cause but the focus of this subcommittee is somewhat different, and that is: Should the Congress act in the face of this Supreme Court decision to establish some minimal standards for States to apply?

Ms. GITTIS. Sir, I think that the Congress has acted in the past where States have not taken action that is appropriate as in the deinstitutionalization provision in the Juvenile Justice Act. Also, although it is not a complete prohibition, as in that act's prohibition on placing juveniles in adult jails related to certain funding provisions. I believe that the Federal Government should take action in this to do what it has done before, to be a leader in this field.

Senator SPECTER. Do you think we should set legislation?

Ms. GITTIS. Yes, I do. I believe that you should.

Senator SPECTER. You are accompanied by Ms. Fink who is the assistant district attorney?

Ms. GITTIS. No; Ms. Fink is the assistant attorney in charge of the Juvenile Rights Division.

Senator SPECTER. She is not the assistant district attorney?

Ms. GITTIS. No; she is not. She litigated the *Martin* case with Professor Guggenheim.

Senator SPECTER. I was told that she was the assistant district attorney.

Ms. GITTIS. Oh, no.

Senator SPECTER. And I could not understand how she helped you, considering your view.

Ms. GITTIS. No; I think the district attorney's are on another panel, Senator.

Senator SPECTER. All right.

Well, thank you very much I am sorry we have to move along at such a pace. We have the Department of Defense authorization bill on this morning and I have an amendment on the summit conference to offer later this morning if I can get to the floor. So there is some need to proceed with some dispatch, but I am very interested in your views. And Ms. Gittis, I would ask you to focus on the same questions I raised with Professor Guggenheim because my instinct is to move ahead in this field. And I would ask beyond that if you

would care to try your hand at some legislative drafting. It would be very helpful because of the limitations that we have on our Senate committees on staff. It would be very helpful because to the extent that we can move with promptness on this matter there is really great merit. That is why we have scheduled the hearings immediately after this decision and it would be my inclination to introduce legislation on this.

To the extent that you could help us, it would be very appreciative.

All right, thank you very much.

[The prepared statement of Ms. Gittis follows:]

PREPARED STATEMENT OF LENORE GITTIS

I am Lenore Gittis, Attorney-in-Charge of the Juvenile Rights Division of The Legal Aid Society of New York City. The Legal Aid Society is a private, non-profit agency which has been providing legal representation to the poor of the City of New York since 1876. With a full-time legal staff in excess of 600 and a caseload in excess of 225,000 annually, the Society is the largest and oldest provider of legal assistance to the indigent in this nation. Its Juvenile Rights Division has been in existence since 1962 when, preceding the Supreme Court's decision in Matter of Gault, 387 U.S. 1 (1967), by five years, the New York State Legislature enacted the Family Court Act, mandated counsel in juvenile proceedings, and contracted with The Legal Aid Society to provide such counsel. The Division's present staff of 160 persons, including attorneys, social workers, educational consultants and investigators provides representation to approximately 17,000 juveniles who come before New York City's five Family Courts annually. These children include the vast majority of alleged juvenile delinquents and status offenders, as well as those thousands of children who are subjects of child protective proceedings.

As the juvenile justice system has been developing, we have been working to clarify and implement due process and other rights of children. Our involvement in this vital process engendered serious concerns regarding the historically excessive and often inappropriate pre-trial confinement of our clients in secure detention facilities and led us to litigate the case of Schall v. Martin, __ U.S. __ (June 4, 1984), 52 U.S.L.W. 4681 (June 5, 1984) as co-counsel with the American Civil Liberties Union. Thus we are before you today, and we welcome the opportunity to express our views on this important issue.

However, before turning to my specific comments on pre-

ventive detention of juveniles I want to make a general observation. Like most citizens of this country, we in The Legal Aid Society are alarmed and disturbed by the impact of crime in our society and the dreadful toll it exacts in so many communities. We are also concerned that the measures society takes to meet this challenge not diminish the individual liberties fundamental to a free society. Such measures can be designed by a legislature intent on doing so. For example, the New York State Family Court Act was amended in 1976 to mandate the court to consider the needs of the community as well as the needs and best interests of the child in fashioning an appropriate order of disposition. The legislature recognized that society has a legitimate interest in protecting itself, in protecting and fostering the health and growth of its children and in protecting the liberty interests of its citizens. The 1976 amendment created a scheme that balanced these interests in accordance with due process mandates. However, we have seen no such attempt at balancing such critical societal interests in New York's preventive detention statute.

Nevertheless, I am not here to relitigate the Martin case. The Supreme Court has spoken and presently preventive detention of juveniles is constitutionally permissible in our country. However, pursuant to the decision, there are a number of directions in which states and the federal government are free to go in considering the issues involved in preventive detention. Thus it is critical to review some aspects of both the majority decision and the dissent prior to discussing possible options.

The Schall v. Martin Decision

It is our opinion that the Martin decision turns the clock back almost twenty years and leaves us with a fossilized monument to pre-Gault days when judges had unfettered discre-

tion over the lives of youngsters in juvenile courts. Based on their own value systems and prejudices, judges decided what particular acts offended them, which children should be allowed to remain at home and which ones should be placed away from home - all in the service of what they considered a benign exercise of the parens patriae doctrine. Fortunately, in the service of fundamental fairness critical to all concerned with liberty interests in a free society, the Supreme Court held that unfettered and arbitrary discretion was not quite fair enough and that juveniles were entitled to protection of due process of law. Thus juveniles became entitled to protections essential in securing fair treatment in this nation's courts, i.e. trials comporting with many of the due process requirements that had been reserved only for adults.

Because the juvenile court is an evolving system, Gault did not establish the clear requirements of due process for children. Thus, we were left with a number of practices that would be unacceptable if we were addressing the liberty interests of adults, some to be cured at a later time (e.g. proof beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970). One that is clearly not cured is preventive detention determined by judges with the same unfettered discretion so deplored by the Supreme Court in Gault.

It is our belief that the Martin decision is wrong from a constitutional vantage point. It gives short shrift to the established principles of due process and fundamental fairness required in cases where a severe deprivation of liberty is at stake. Like adults, children arrested for criminal conduct are presumptively innocent and enjoy due process rights; charges against them must be proven beyond a reasonable doubt before punishment may be imposed. In Re Winship, 397 U.S. 358 (1970). However, as a result of the Martin decision, children, unlike adults, may be securely detained before trial based upon judicial speculation of

questionable accuracy as to future crime commission. The decision gives an imprimatur to a statute totally lacking in standards, limitations and protections aimed at minimizing the enormous risk of erroneous detention inherent in the unimpeded and, from a practical point of view, essentially unreviewable exercise of judicial discretion.

Moreover, the decision is unwise in terms of social policy, serving neither society's interests in crime prevention nor the juveniles' interests in successful and healthy development. Thus we agree with the dissenting justices in Martin that the decision "upholds a statute whose net impact on the juveniles ... is overwhelmingly detrimental", advancing "no public purpose ... sufficient to justify the harm it works." The injuries to children as a result of such detention are legion and fully documented in a vast body of research well known to practitioners in the juvenile justice and child welfare fields.

The information in that literature was illustrated all too tragically at the Martin trial. The undisputed evidence, provided by the state's as well as plaintiffs' witnesses, inter alia, illustrated the jail-like, stigmatizing and punitive conditions to which children in New York City's juvenile detention facility are subjected. Detained children follow an institutional regimen offering few, if any, habilitative or educational services. They face all too frequent sexual and other assaults, are strip searched, room confined, group confined, are traumatized by the separation from family and community, are exposed to convicted children who teach them the ways of crime and are seriously impeded in their abilities to assist in their defense at trial and disposition. Undisputed information provided by amici curiae* regarding juri-

*See, e.g., Amicus curiae briefs of the Youth Law Center and Juvenile Law Center of Philadelphia at 5-8, 15-22; Amicus Curiae Brief of the American Bar Association, at 17-20; Amicus Curiae brief of the National Legal Aid and Defender Association, at 7-11.

diction outside New York City illustrates that these harms are compounded by the pervasive incarceration throughout this country of children in adult jails under abusive and frequently life-threatening conditions. Given these undisputed facts it becomes impossible to assimilate the meaning of the statement in the majority decision that curtailment of a juvenile's liberty when he is in detention "is mitigated by the fact that juveniles, unlike adults, are always in some form of custody." (52 U.S.L.W. at 4684)

The benefits to society of allowing pretrial preventive detention of children are negligible, if not nonexistent. As Justice Marshall observed:

> Only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty interests of all presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance.

Clearly to the extent that detention exposes children to abuse, schools them in crime and impedes their development, society, not just society's children, lose. Likewise, if juvenile laws are overbroad in their reach and are administered without the fairness and equity so fundamental to our democratic ideals, it is, in Justice Marshall's words, "bound to disillusion its victims regarding the virtues of our system of criminal justice."

IMPLICATIONS FOR FUTURE POLICY

However, while disagreeing with the premises of the decision and while dubious about its promised benefits, we must make a realistic assessment of its implications for future juvenile justice policy on a national as well as state level. It must be recognized that Justice Rehnquist's decision was limited to a holding that detention imposed non-punitively in a juvenile detention center in order to serve

the child's and the public's interests in safety was not unconstitutional. He specifically left open the possiblity of individual litigation challenging particular instances of punitive detention and deferred to the legislatures the responsibility to draft statutes optimally furthering public policy. We hope that Congress, as well as state legislatures, in exercising that responsibility will be heedful as much to what the Martin decision does not do as to what it does.

First, the decision explicitly found the detention at issue, which was in New York's juvenile detention center, to be non-punitive and consistent with the state's "parens patriae interest in preserving and promoting the welfare of the child" (52 U.S.L.W. at 4684) and sufficiently solicitious of the juvenile's right to counsel and other protections to comport with due process. The decision, therefore, did not authorize incarceration imposed for punitive purposes, incarceration in adult jails differing sharply from the "controlled environment" depicted in New York (52 U.S.L.W. at 4686, or incarceration in the absence of at least the minimal protections contained in New York's recently enacted Juvenile Delinquency Procedure Code. Far from giving a blank check to localities to detain children, the Martin decision specifically stressed the importance of notice, counsel, a timely probable cause hearing, a statement of facts and reasons suppporting detention and a mechanism for practical review in individual cases. (52 U.S.L.W. at 4688).

Moreover, the recurrent emphasis in the opinion on the state's parens patriae role as substitute custodian when "parental control falters" (52 U.S.L.W. at 4654) underscores the state's responsibility to ensure that detention, when imposed, must be safe and humane and must further the children's best interests. If anything, the decision should provide impetus to the federal and state governments to step

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up their efforts to eliminate the still pervasive problem of children in substandard detention facilities and adult jails. Unfortunately, those problems have not abated. As Senator Specter recognized, in introducing S.522, the Juvenile Incarceration Protection Act, now pending in the Senate, almost a half million children are confined in adult jails and lockups annually -- an astounding figure which has remained largely unchanged during the past several years. Physical conditions, as documented by a General Accounting Office study, are largely substandard and often unsafe; sight and sound separation from adults, if provided, sometimes takes the form of "dungeon"-like isolation. [U.S. General Accounting Office, Report to the Attorney General and Secretary of the Interior: Improved Federal Efforts Needed to Change Juvenile Detention Practices," (GAO/GDD 83-23, Mar. 22, 1983). As found in a major Department of Justice-sponsored study, the suicide rate of juveniles in adult jails is eight times that in juvenile detention centers [Community Research Forum, U.Ill., Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups and Juvenile Detention Centers (1980)].

Second, while ruling New York's statute not unconstitutional on its face, the Supreme Court did not provide support for detention of children in individual cases where neither their interests nor society's can be said to require it. Thus, as a matter of public policy, detention remains unwarranted for children charged with trivial crimes, children without any history of violent crime, children who had already been safely released by the police upon arrest prior to arraignment and children whose predicted crime is of a nonviolent nature. Since these groups together comprise the vast majority of detainees, a tightly drawn detention statute would eliminate an enormous amount of harmful and unnecessary detention. As demonstrated in the Martin record over half the detained

juveniles in the Division for Youth statewide statistics, as well as plaintiffs' sample cases, were charged with minor offenses -- offenses which would not have qualified them to be detained under the far more narrowly drawn adult detention statute in force in Washington, D.C., which was sustained by the courts in United States v. Edwards, 430 A.2d 1321 (D.C.App. 1981), cert. denied sub nom Edwards v. U.S., 455 U.S. 1022 (1982).* Indeed, the thirty-four sample cases submitted by plaintiffs included cases in which the juveniles were charged with "three-card monte", stealing a pair of shorts and stealing subway-bus transfers. At least twenty-three were first offenders and sixteen had originally been released by police and appeared in court without any new arrests. Clearly, a tightly delimited statute foreclosing detention in such cases would better serve society's and the juvenile's interests.

Third, the Martin case provides no authority for, and should, therefore, not be looked to as justification for harsh and arguably unconstitutional legislative proposals for preventive detention of adults. Justice Rehnquist explicitly grounded the Martin decision on the fact that juveniles were involved, that parens patriae was a prime concern and that "juveniles, unlike adults, are always in some form of custody." 52 U.S.L.W. at 4684 (emphasis added). Importantly, the Supreme Court declined to reach the issue of the legitimacy of adult preventive detention in Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979); Murphy v. Hunt, 455 U.S. 478 (1982); and U.S. v. Edwards, supra.

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*We do not agree with the District of Columbia Court of Appeals in Edwards that the detention permitted in the District of Columbia is constitutional since, as in Martin, we contend that such detention constitutes punishment before trial. However, given the reality of the Martin decision, the specificity in the D.C. statute is far preferable to the scant guidance given the Family Courts by New York's detention provision.

Recognition of the limits in the decision and the weighty responsibility placed by it upon the legislative branch leads us to several recommendations. Like Justice Marshall, and the Supreme Court in Gault, McKeiver and other cases, we believe that injecting fairness into the juvenile system does not jeopardize it; it can only improve it. At minimum we support passage of S.520 and S.522, the Dependent Children's Protection Act and Juvenile Incarceration Protection Act. We urge Congress to continue its efforts to make real the goal of the 1974 Juvenile Justice and Delinquency Prevention Act to protect children from the harms of inappropriate incarceration -- to remove status offenders from secure institutions and delinquents from adult jails and lock-ups. We urge Congress as well to reauthorize the Act and continue the important work of the Office of Juvenile Justice and Delinquency Prevention.

Indeed, we make these recommendations at a hopeful time. Juvenile arrests for index violent and serious property crimes, as well as crime in general dramatically declined from 1981 to 1982, notwithstanding a general increase in adult arrests during that period.* Indeed, according to the New York City Police Department, juvenile arrests reached a peak level in 1975 and have been declining ever since, to the point where they are now below the level of 1968.

Finally, we urge the federal government to provide an impetus to localities to infuse their detention practices and laws with basic ingredients of fairness -- at the very least, limits or guidelines as to the types of crimes which

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*See N.Y.S.Div.of Crim.Justice Services, 1981 Annual Report: Crime and Justice, at 126-129; N.Y.S.Div.of Crim.Just.Services, 1982 Annual Report: Crime and Justice, at 124-128. Arrests for juveniles under age sixteen for index violent crimes, index serious property crimes and crime in general decreased from 6788, 28619 and 106566 respectively in 1981 to 5924, 24151 and 84977 respectively in 1982 -- respectively a 12.7%, 15.6% and 20.2% decrease. [Index violent crimes include murder, manslaughter, forcible rape, robbery and aggravated assault. Index serious property crimes include burglary, grand larceny and arson].

can give rise to detention, the types of crimes which the juvenile is presumably at risk of committing if released, the prior delinquent history required to trigger detention, the threshold level of evidence which must be adduced as to the crime charged and the standard of proof applicable to the determination. [See, e.g. Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982)(Newman, J., concurring), cited in Schall v. Martin, 52 U.S.L.W. at 4695 (Marshall, J., dissenting)]. Additionally, consideration of standards governing detention, such as those contained in the IJA-ABA Juvenile Justice Standards Project, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition (Approved Draft 1979), should be encouraged as a means of curbing detention abuses and lessening the random nature of its application.*

With these recommendations, we do not endorse the Supreme Court's finding that a judge can predict future criminal actions on the part of any individual, adult or child. We believe the Court is wrong, but they have stated the law of the land. We also believe that the utilization of such guidelines cannot cure the demonstrated unreliablity of prediction, but it may partially mitigate the randomness with which children can be detained prior to trial.

On October 22, 1981, Archibald R. Murray, the Attorney-in-Chief and Executive Director of The Legal Aid Society testified before the subcommittee on the issue of predictability and preventive intervention. Because of the Martin decision, I think it is fitting to close my statement with the thoughts he left with you on that day:

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*See also Amicus Curiae Brief of the American Bar Association in Support of Appellees in Schall v. Martin.

It is easy to salute liberty in the abstract. It may often be difficult to remember that it is not merely an abstract principle but a right of all citizens, including our children. Only insofar as we reject proposals that would undercut that right can we hope to remain a free and democratic society governed by the rule of law. In this time of great passion about crime we must be extremely careful, for our own safety's sake, not to let our zeal to fight crime lead us to destroy our liberties.

On behalf of The Legal Aid Society of New York City, once again I want to thank you for the opportunity to share our experiences with you and to express our concerns and reservations about preventive detention.

Senator SPECTER. I would like now to call District Attorney Richard Lewis from Dauphin County.

Welcome, Mr. District Attorney. We very much appreciate your coming.

District Attorney Lewis and I are old friends from fighting crime problems in the State of Pennsylvania and Mr. Lewis brings with him a very distinguished record as a prosecuting attorney in Dauphin County, which is the county seat of—Harrisburg is the county seat but, more importantly, it is the situs of the Capitol of the Commonwealth of Pennsylvania.

Mr. Lewis has his bachelor's degree with distinction in journalism from Rutgers University in 1969 and his J.D. from Dickenson Law School and has teaching experience and extensive work experience as the deputy district attorney since 1972, with a very distinguished district attorney, the Honorable Leroy Zimmerman who is now the attorney general of the State of Pennsylvania.

Mr. Lewis moved up the chairs from chief deputy assistant to first assistant and district attorney since 1980, so we welcome you here, Mr. Lewis, and look forward to your views on the subject.

STATEMENT OF RICHARD LEWIS, DISTRICT ATTORNEY, DAUPHIN COUNTY, PA

Mr. LEWIS. Thank you, Senator, and thank you for the invitation to appear before you to express my views on preventive detention.

Senator, I have submitted some testimony and as I understand that will be made part of the record.

Senator SPECTER. Yes, it will be.

Mr. LEWIS. I know you are in a hurry, so simply to expedite I would like to summarize some of the views expressed in the submitted testimony. That testimony highlights some of the juvenile crime problem we have in Dauphin County. Dauphin County, as you know, is a semiurban county in the middle of the State and we do not have the problems of the big cities. But then again we are not a completely rural area, either. And so we have perhaps the best of both worlds, if you will.

Nevertheless there is a serious juvenile crime problem and the subject of preventive detention does come up and Dauphin County

does have a secure juvenile facility as well as nonsecure facilities for prehearing juvenile detainees.

Nevertheless, in reviewing the Pennsylvania statute, which is more or less in conformance and sets the same tone as the New York Family Court Act, and reviewing the recent court decisions.

I do have one or two concerns and the previous speakers did mention some of them, and that is, first of all, because of the lack of juvenile facilities now in existence, certainly in the central Pennsylvania area, I can speak with some authority on the lack of those facilities. And I imagine that holds true all across the Nation.

The use of preventive detention, I think, has to be taken rather seriously because of the lack of space. Its unrestricted use, I think, would wreak havoc on the juvenile justice system and I think it would strain the ability of the system to handle too many juveniles. For example, in Dauphin County our juvenile secure juvenile detention center has a capacity of only 18, 12 boys and 6 girls, that is normally filled to capacity; occasionally it is overcrowded but not that often. But nevertheless, we are right there on the verge of having a problem in that area as far as overcrowding, and we are a small county. I can just imagine what the situation would be like in the larger counties.

Senator SPECTER. Your basic point is that you just do not have the space to have very much pretrial detention of juveniles?

Mr. LEWIS. That is correct. We have to prioritize what juvenile offenders are going to be detained.

Senator SPECTER. What kinds of cases do you use the preventative detention, Mr. District Attorney?

Mr. LEWIS. Again, Senator, there are no standards specified in the Pennsylvania Act, or I should say there are some standards but they are rather vague, I feel. Nevertheless, I think the court is going to look and should be looking at the seriousness of the case, whether there are any aggravating injuries to the victims, the extent of property damage.

Second, I think it is important to note and to consider the prior juvenile history of the youngster appearing before the judge. What type of adjudications has he had for delinquent acts in the past, were they minor stealing of a hub cap or were they serious robberies or burglaries or rapes or what have you.

Third, I think an examination has to be made of the juvenile's home environment. Is there a lack of supervision? And a lot of that you can tell by the crime itself. If the juvenile is out at 3 o'clock in the morning burglarizing homes, well, that sort of indicates what his particular home environment and the supervision of the parent is like.

I think the court has to consider any other factors that are relevant to the juvenile, perhaps committing more crimes in the interim prior to his hearing or perhaps anything relevant to whether or not he is going to appear. What may be relevant to his committing more crimes in the interim are the circumstances of his case, the relationship between he and the victim. Is this some type of grudge or is he going to go back and get revenge upon the victim for reporting this crime? Is he a member of a gang? That may be more important in the larger cities when you have youthful juvenile

gangs. And is he a member of a gang, and as such will he continue to associate with that gang and continue committing serious crimes? That may be another factor in deciding whether or not to detain him.

Senator SPECTER. Does your office make requests to have juveniles retained in detention?

Mr. LEWIS. Occasionally we do.

I should point out as I have in the testimony, just very, very briefly, Senator, that in Dauphin County the initial detention decision is normally made by a probation officer. I am sure it is that way in many, many places.

Senator SPECTER. How soon after arrest is there a hearing in Dauphin County?

Mr. LEWIS. The law requires that there is a hearing within 72 hours and normally that is very easy to meet that requirement and it only becomes a problem perhaps over long holiday weekends.

Senator SPECTER. Where are the facilities in Dauphin County for detention?

Mr. LEWIS. The facilities are right next to the adult prison, about 100 yards away in a separate building. No connection whatsoever——

Senator SPECTER. Where is that located?

Mr. LEWIS. That is in the area adjacent to the Harrisburg East Mall and behind the Dauphin County Home.

Senator SPECTER. How many spaces are there available?

Mr. LEWIS. There are 18 spaces, 12 male and 6 female in the juvenile detention center There are other nonsecure facilities available.

Senator SPECTER. Is it customarily filled?

Mr. LEWIS. Again, yes, it is, Senator. I just checked as a matter of fact yesterday, and I was surprised to find that there were only nine. In other words, it was half full yesterday or half empty, depending how you want to look at it. But I checked with the chief probation officer and he indicated to me that it was very, very rare. It usually hovers around full capacity, occasionally being overcrowded.

Senator SPECTER. What kinds of cases are ordinarily involved in the juveniles being held in secure detention prior to the hearing?

Mr. LEWIS. From my contact with the juvenile probation people and speaking at length with the chief probation officer before coming down here today, it seems that the court attempts, whenever possible—juvenile probation whenever possible to limit those incarcerated to serious felony cases, burglaries, robberies, some type of serious assault, sexual assault cases and the like.

Senator SPECTER. Is the essential test whether the juvenile, if at large, would be likely to commit another offense in the interim before hearing trial?

Mr. LEWIS. I think that is a consideration. Nevertheless, I like to think that a lot of emphasis is placed on the prior records.

As I said, it is—initially it is the juvenile probation officer making the initial detention decision.

Senator SPECTER. But is not the significance of the prior record really an evaluation as to whether the juvenile is likely to commit another offense while at liberty?

Mr. LEWIS. I think it is.

Senator SPECTER. Is there any other legitimate consideration for detention awaiting trial than the likelihood of committing another offense?

Mr. LEWIS. Yes, I think there are other considerations.

First of all, you have the likelihood of the juvenile appearing. Is there a likelihood that he may flee the jurisdiction or not show up when he is called for, that I think has to be an important consideration.

Secondly, you have——

Senator SPECTER. Do you have many problems of flight with juveniles?

Mr. LEWIS. I would say we have a minor problem in that area, not as severe as in the adult area perhaps. But there are too many occasions when juveniles do no show, which necessitates that it be a matter of concern.

Other factors perhaps to take into consideration are the home environment itself. Many, many times that you may have a——

Senator SPECTER. How is that relevant? Can the home environment be worse than the jail?

Mr. LEWIS. Oftentimes it can. If, for instance, let us suppose the juvenile is committing burglaries late at night. That indicates just by the facts that there is very little supervision at home. A lot of times after the arrest the juvenile, the police officer, the probation officer is not able to make contact with any parent or guardian or anyone in the household. No one will come to the police station or wherever to check on the juvenile, to follow up at the request of the police to come down to the police station and so forth, which indicates that there really is no home environment.

Now, to release the juvenile to a negative home environment may certainly add to the lower or add to the threat of the juvenile committing more crimes while awaiting a hearing.

Senator SPECTER. So you say there are three factors: flight, home environment, likelihood of committing another offense.

Mr. LEWIS. Correct.

Senator SPECTER. Do you think that—I appreciate your setting forth some of the provisions of the Pennsylvania law here.

Do you think that it would be useful for there to be a statutory—any further statutory specification as to the circumstances for detention? Pennsylvania law goes into some detail.

Mr. LEWIS. Senator, I have no objection to seeing some type of legislation setting forth minimum standards. I am a very strong believer in preventative detention but I have no objections to seeing some minimum standards that would be applied on a national level for judges. And, more importantly and what disturbs me the most, is not so much the judicial decision, even though that is what the Supreme Court case centered on, is the nonjudicial decisions that are made up front at the very beginning the moment a juvenile is arrested or shortly thereafter by a nonjudicial officer, more like a probation officer.

Senator SPECTER. So you think it would be an appropriate field for the Congress to legislate in?

Mr. LEWIS. Yes, I do, Senator.

Senator SPECTER. Under Pennsylvania law, do you now have the opportunity to certify say a 16 year old charged with aggravated robbery, crime as an adult?

Mr. LEWIS. That is correct.

There is a certification procedure to adult court for serious crimes and some examination is made naturally by the court. And this has to be at a full-blown hearing before the juvenile judge, some examination has to be made of the prior adjudication of the juvenile as well as home environment and many other factors as well.

Senator SPECTER. When that occurs, is that juvenile then eligible for being confined in an adult facility?

Mr. LEWIS. That is correct. And he would be subject to bail just as in the adult system.

Senator SPECTER. What is your sense as to how the pretrial detention of juveniles works out in Pennsylvania generally?

Mr. LEWIS. Again——

Senator SPECTER. Is it a reasonably fair basis?

Mr. LEWIS. I think it is. I can only speak for the central Pennsylvania area. I can say this, the hearings are held promptly within the 72 hours. We have a system of masters being appointed to handle the—what is commonly called the detention hearing, instead of the juvenile court judge. Proper notice is given, attorneys are supplied for the juveniles if they cannot afford an attorney or if the parent cannot afford an attorney. Proper referral is made to the juvenile court and all hearings of major cases, whether the juvenile is detained or not are held well within 10 days. So it seems to be a very active, a very progressive system.

Nevertheless, the preventative detention aspect, I think, is an important part of it and a necessary part of it.

Senator SPECTER. Mr. Lewis, in light of the statistics which we see on the national level of crime going down, do you sense that crime is going down in your jurisdiction?

Mr. LEWIS. Yes, Senator, and the submitted testimony, I listed some of those statistics which show that for Dauphin County, a major drop in some key areas between 1982 and 1983, a steady rise——

Senator SPECTER. Attributable to the effective work of a prosecutor?

Mr. LEWIS. Pardon me, sir?

Senator SPECTER. Attributable to the effective work of a prosecutor?

Mr. LEWIS. Senator, I would like to think so, but more than likely, as many of the experts say, it is more than likely attributable to the decrease in the prime population, between the ages of, say 14 and 24, and that age group is constantly going down, and actually that lessens the burden of the criminal justice system.

Senator SPECTER. Do you have enough spaces for incarceration of juveniles who are adjudicated delinquent, or the judge thinks they ought to be in custody after trial?

Mr. LEWIS. Again, quite often they are sent to State run or privately run institutions, and quite often there is a significant waiting period for the youngster to be admitted to one of these secure facilities.

Senator SPECTER. Governor Thornburgh has set forth an ambitious $160 million construction program, which is very much a credit to Pennsylvania.

Do you sense that when that is completed, there will be adequate spaces for detention in Pennsylvania.

Mr. LEWIS. Again, in the juvenile areas, it is difficult to say. That certainly will relieve some of the pressure, I am confident of that, but whether it will be adequate space, I think depends a lot on what happens perhaps here today, and in the future, in setting guidelines so that courts and juvenile court judges can prioritize the confinement of youngsters.

I am very much in favor of the most serious, violent offenders being detained prior to hearing, and perhaps even after hearing, if a judge so decides, but I am not in favor of those charged with a minor crime being detained, for no other reason than the whim of a probation officer.

Senator SPECTER. Do you have a sense that the Supreme Court left too large an area for States to hold juveniles in secure detention, based on this Supreme Court decision?

Mr. LEWIS. I think they left some unanswered questions, Senator, and I think there is room for some minimum standards that can be set to guide judges and probation officers and prosecutors in determining what juveniles should be detained.

Senator SPECTER. That is very helpful. I really appreciate your coming down.

I very much wanted to get the view of Pennsylvania in these proceedings, and thought your experience would be a good starting point.

Thank you very much.

Mr. LEWIS. Thank you, Senator.

[The prepared statement of Mr. Lewis follows:]

Prepared Statement of Richard A. Lewis

Dauphin County is a Third Class Pennsylvania County with a population of approximately 235,000 people. It lies near the center of the State, approximately 100 miles outside of Philadelphia and 200 miles from Pittsburgh. The County seat is at Harrisburg, the State Capitol.

Dauphin County has traditionally had a serious street crime problem. Over the last five years, Dauphin County has ranked among the top three Counties in Pennsylvania in per capita percentage of class I crimes. Naturally, a serious juvenile crime problem has always accompanied these "adult" statistics.

Allegations of juvenile delinquency increased during 1982 by ten percent over 1981 totals in Dauphin County. However, in 1983 the incidence of juvenile crime began to decrease. Allegations of juvenile delinquency decreased from 1,661 crimes in 1982 to 1,303 crimes in 1983. This was the lowest number of juvenile crimes referred to the Dauphin County Juvenile Probation Office in the past five years. Burglary, the crime referred to the Juvenile Probation Office most often from 1979 to 1983, dropped from 387 in 1982 to 217 in 1983.

The number of individual juveniles accused of crime and referred to the Dauphin County Juvenile Probation Office decreased from 669 in 1982 to 528 in 1983. This figure represents the lowest number of juveniles referred to the Probation Office in more than a decade.

Approximately sixty percent of juvenile crime in Dauphin County occurs within the city limits of Harrisburg.

Dauphin County has a "secure" juvenile detention facility called the Woodside Detention Center. It has a capacity of 18 (12 boys and 6 girls). The present population as of June 18, 1984, was 9. The facility is quite often filled to capacity but seldom overcrowded.

There were 283 "admissions" of juveniles to the Detention Center during 1983. The average stay was 16.1 days per juvenile,, with some juveniles being admitted more than once. These figures represent a significant decrease in admissions since there were 387 during 1982; and 402 in 1981. The average length of stay, however, in 1982 was 13.1 days and 12.3 days in 1981.

There are also two other programs in Dauphin County that provide detention for juveniles on a non-secure basis.

Pennsylvania's Juvenile Act, 42 Pa. C.S.A. 6301, et seq. provides that a juvenile between the ages of ten and eighteen can be detained for up to seventy-two hours prior to any hearing before either the Juvenile Court or a "Master" if his detention is:

> "....required to protect the person or property of others or of the child or because the child may abscond or be removed from the jurisdiction of the Court or because he has no parent, guardian, or custodian or any other person able to provide supervision and care for him and return him to the Court when required, or an order for his detention or shelter care has been made by the Court...." (42 Pa. C.S.A. 6325)

The Dauphin County decision allows this initial detention decision to be made by a Juvenile Probation Officer, occasionally supplemented by the recommendation of a Police Officer who has taken the juvenile into custody. The Probation Officer is normally reached by telephone during evening and weekend hours, and has the authority to order the youngster committed to the Juvenile Detention Center if <u>any</u> of the criteria mentioned above are met. Within seventy-two hours, there must be an "informal hearing" (commonly called a detention hearing) in front of the Juvenile Court Judge or a Master appointed by the Court for such purpose. The purpose of this hearing is to determine if a prima facie case exists as to the delinquent act the child has allegedly committed, and also to determine whether his detention or shelter care should continue. Notice of the hearing must be given to the child as well as parents or guardian, if they can

be found. The juvenile has a right to appointed counsel and also has the right to remain silent with respect to any allegations of delinquency.

After the initial detention, a Petition must be immediately filed with the Juvenile Court authorities alleging the delinquent act. A hearing in front of the Juvenile Court Judge must be held within ten days after the filing of a Petition if the child is in custody. The child may be detained or kept in shelter care for an additional ten days where:

(1) the Court determins at a hearing that:

(i) evidence material to the case is unavailable;
(ii) due diligence to obtain such evidence has been exercised; and
(iii) there are reasonable grounds to believe that such evidence will be available at a later date; and

(2) the Court finds by clear and convincing evidence that:

(i) the life of the child would be in danger;
(ii) the community would be exposed to a specific danger; or
(iii) the child will abscond or be removed from the jurisdiction of the Court. (42 Pa. C.S.A. 6325)

The Pennsylvania Juvenile Act is similar to the New York Family Court Act which authorizes pretrial detention of an accused juvenile delinquent based on the finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." Section 6325 of the Pennsylvania Act indicates that the child may be detained "to protect the person or property of others or of the child." In order for the Court to continue the detention for another ten day period, Section 6325 provides that the Court may take into consideration that "the community would be exposed to a specific danger."

While couched in different terminology, the Juvenile Acts' in both States provide for preventive detention of

juveniles in order to protect the child as well as society from the potential consequences of the child's criminal acts. Under the New York practice, as enunciated in Schall v. Martin, decided by the United States Supreme Court on June 4, 1984, a juvenile is usually ordered detained by a sitting Family Court Judge. In those instances where Family Court is not in session and parents are unable to be notified, will the child be taken directly by the arresting officer to a Juvenile Detention Facility. If such is the case, the child must be brought into Family Court on the next court day or within seventy-two hours, whichever is sooner.

The Dauphin County practice allows the initial detention decision to be made by a Juvenile Probation Officer, over the telephone, to be followed up by a detention hearing in front of either a Judge or a Master within seventy-two hours.

* * * * * * * * * * *

The United States Supreme Court has concluded that preventive detention "serves the legitimate state objective of protecting both the juvenile and society from the hazards of pre-trial crime." While I cannot argue with the reasoning of the Court as to the need for preventive detention of juveniles, I do have concerns about the procedural safeguards afforded under the Pennsylvania Act. The primary concern is that in Pennsylvania the initial detention decision is more often than not made by a Probation Officer as opposed to a Judge and/or Master. As a practical matter, most Pennsylvania Counties outside of Philadelphia and Allegheny do not have sufficient resources to have a Juvenile or Family Court Judge available in a central location twenty-four hours a day, seven days a week to make the initial detention decision. Even the concept of Masters available twenty-four hours a day is economically unfeasible for most Counties in the State. Accordingly, a decision whether or not to detain a juvenile for up to seventy-two hours is more often than not made by a non-judicial officer.

Secondly, no criteria are listed in the Pennsylvania Act

for either the initial detention decision of the Probation Officer or the subsequent decision by the Court to extend the period of detention for a second ten day period. Section 6325 only speaks to the protection of the personal property of others or of the child. No weight is given to the severity of the offense, the relationship of the child to the victims, the child's prior juvenile history, and other factors which may affect the protection of "the person or property of others." No standard of proof is given for the decision-maker to follow.

In Section 6335, where the Court is allowed to extend the time of detention for an additional ten day period, the Court is at last provided with a standard of proof, "clear and convincing evidence," but given no criteria or guidelines as to what constitutes the community being "exposed to a specific danger."

The Pennsylvania Juvenile Act would seem to be in conformance with the thrust of the United States Supreme Court's recent decision in Schall. The Court has acknowledged the need for some type of preventive detention for juveniles since crimes committed by youngsters do account for an alarming percentage of the violent street crime in America. The Supreme Court's decision is and should be hailed by law enforcement as a positive step that addresses the seriousness of the juvenile crime problem. Nevertheless, we must not loose sight of the fact that the liberty of these youngsters is at issue and should only be taken away with the proper standards of due process and fair play in mind.

My only criticism of the Pennsylvania Juvenile Act and the Schall decision is that it fails to set definitive standards or criteria for Judges, Masters, (and Probation Officers) to follow before depriving a youngster of his or her liberty. A special concern must be the fact that in some Pennsylvania Counties its a non-judicial officer making the initial, pre-hearing decision. The factors that I feel should be consider-

ed before a preventive detention decision is made are the following:

- the nature of the delinquent act (this would include an analysis of the seriousness of the crime as well as the extent of injuries to persons or property, the grading of the criminal conduct.)
- the juvenile's record of previous adjudications of delinquency.
- whether or not the juvenile has a demonstrable record of wilful failure to appear at juvenile proceedings in the past.
- consideration of alternative forms of control, short of secure detention, available to reasonably reduce the risk of flight or danger to others.
- an analysis of the juvenile's family environment.
- another factors reflecting on the juvenile's danger to himself or the community, as well as his intention of appearing for future hearings, trials, etc.

Such guidelines would necessarily stress that the Juvenile who commits the violent crime, or any other serious felony, as well as the juvenile who has history of adjudications of delinquency should be detained, whereas, a youngster involved in an alleged act of delinquency in the nature of a misdemeanor, with no prior juvenile contacts, should either be released or be subject to some alternate method of control.

Because of the severe shortage of juvenile detention facilities, the advantage of such criteria would be in the earmarking of only the most serious juvenile offenders, who pose some risk of danger to the community or themselves, for detention.

Senator SPECTER. I think we have with us Judge Margaret Driscoll of the superior court, Bridgeport, CT.

Judge Driscoll, I had not known you were present when I moved to panel three. I apologize for that.

It is very nice to have you with us this morning. I note from your biographical resumé that you are a graduate of a very distinguished law school, Yale, 1938, you have very extensive professional experience, prosecuting attorney of Bridgeport City Court, judge of the Connecticut Juvenile Court, chief judge of the Connecticut Juvenile Court, and now judge of the Connecticut Superior Court.

We welcome you here. We very much appreciate your being with us, and look forward to your views.

STATEMENT OF HON. MARGARET DRISCOLL, SUPERIOR COURT JUDGE, BRIDGEPORT, CT

Judge DRISCOLL. Thank you, Senator.

Senator SPECTER. The first question is, How has the Yale Law School changed since you have been there?

Judge DRISCOLL. It got more involved in corporate law.

Senator SPECTER. Not as much involved with public service law?

Judge DRISCOLL. That is right. That is my impression from the various alumni luncheons, and the statements of the dean. You can see where my bias is.

Senator SPECTER. I share that bias with you, and now I am interested to hear your testimony.

Judge DRISCOLL. Well, I am glad to really second the views of the district attorney, because I see that he is interested too in seeing to it that where there is preventative detention, with which I happen to agree there ought to be criteria, and not only because it is a matter of fundamental fairness to the child, but also it is of help to a judge.

If a judge has no standards on which to base his decision, just how he feels on the basis of the basis of the rather minimum information which may be provided, particularly in the case of a first offender, then he is likely to be making decisions which would not stand up to scrutiny, if there were appropriate criteria.

Let me just add a little to my biography. I was on the national advisory committee of juvenile justice and delinquency prevention, and I was chairman of the standards committee when the standards were published in the national advisory, and there are standards published by the national advisory committee which set forth criteria for predicting that a child will commit another act while being held in detention. But let me just start a couple of more things.

I was interested that the Pennsylvania district attorney said that they did not have enough facilities, detention facilities. In Connecticut, we are closing one because the detention population per day is 22 youngsters for the whole State, and there are four detention facilities, ranging in size from 18 to 20, to 25, and one was 12, and the 12-bed facility is being closed as of July 1 because the State feels it is not economically feasible to keep four detention centers for 22 youngsters on a statewide basis.

So, in Connecticut, the detention population is going down. Part of that may be due to the fact that in the last 2 or 3 years, since the New York decision, New York Court of Appeals' decision, and the district court's decision—I am told that the juvenile judges were instructed by the chief judge of the family court to adhere to that decision.

In other words, they decided——

Senator SPECTER. To adhere to a decision by what court again?

Judge DRISCOLL. The circuit court of appeals in the *Martin* case. That the New York statute was unconstitutional, so that they should not detain a child on the basis of a prediction of future misconduct, and that may account for some of it, I do not think it accounts for all of it.

Senator SPECTER. How has that worked out, Judge? Was that viewed as being a reasonable standard, if adequate leeway to law enforcement officials to detain under appropriate circumstances?

Judge DRISCOLL. For a judge to make a decision.

Senator SPECTER. Yes.

Judge DRISCOLL. There are criteria which could be used, and one of the ones you mentioned was the past record. For example, if you have a child who has taken a car every day, every week, before he comes before you, you know that unless he is going to be restrained in some way, he is going to continue to take cars.

Now, taking a car can be a very minor offense, depending on how he is charged. It could be charged as taking an automobile without permission, which is a minor offense, or it is a larceny, which becomes a felony. So between the two, that depends on what the police officer charges.

I am saying this, because some people have said this should be restricted to minor offenses. What is a minor offense? Taking a car is, in my way of looking at it, is a very serious offense, because it puts other people in danger on the highway, because kids have been killed, and people have been killed.

Senator SPECTER. That is why the categorization of misdemeanor is not necessarily conclusive as to what the underlying facts are.

Judge DRISCOLL. That is right, but there should be criteria in the statute, as there are all of the standards, the ABA-IJA standards, the national advisory committee standards, the task force on criminal justice standards, they are all criteria.

Senator SPECTER. Do you have an idea to what extent, if at all, those standards are observed under State laws around the country?

Judge DRISCOLL. Not to any great extent, in some respects.

Now, in other respects, there have been changes in the State laws to conform with ABA standards. More emphasis on due process, I think, has been placed since the standards were in the process of being formalized, even before they were actually adopted. The ABA standards I am talking about.

There were States, a lot of States did a lot of things with their acts. For example, this whole business of transferring youngsters to adult courts all began in that era.

In Connecticut, for example, we changed it to age 14. They may be transferred for certain offenses, and after a hearing in which the juvenile procedures and facilities are deemed to be inadequate. I have always opposed this, because I think it is a cop-out. I think

the adult procedures are inadequate, and the adult facilities are inadequate. Instead of in effect transferring the responsibility to what is inadequate, in what they are supposed to be, it seems to me that the emphasis should be on providing adequate facilities and adequate programs for youngsters who do commit these serious offenses, and there are programs which are now in existence for the very violent offenders, which seem to be successful.

There is one in Maine, one in Colorado.

Senator SPECTER. What kinds of programs are these?

Judge DRISCOLL. These are secure treatment centers, with very intensive treatment. In Maine it is a very eclectic kind of treatment. It is a changing of the thought process. In fact, they have a whole diagram which the youngsters seem to understand, I do not seem to understand, in which they could tell you, there are quotations from the study that I have read, how their thoughts are changed over a period of time, how the way they decide if they do, to do this, then one kind of thought comes, if they do something else it is another thought.

Somehow the theory is—and Dr. Glazer is supposed to be chief proponent of this, psychologist.

Senator SPECTER. In Maine?

Judge DRISCOLL. No; he is not there, but it is his theory. It is his theories. I cannot think of the man who is running it. Of course, it is small, it is 12—it is 26, 12 violent sexual offenders, and 12 violent offenders, and they are—they both go through the same program.

Colorado also has the secure treatment center, which has violent offenders, violent sexual offenders. It has a little different approach to the sexual center than they do in Maine, because of the nature of the act.

But these are treatment centers which have not been proven to be successful in the usual way It is very difficult to prove a lot of this.

Senator SPECTER. Judge Driscoll, when we finish the hearing, I would like Mr. King to talk to you more about that, to get more of the specifics. I would like to pursue that. I am unaware of them.

Judge DRISCOLL. OK. In fact, I can give you a study. I have not got it with me, but I can send it.

Senator SPECTER. I would very much like to see it.

Judge DRISCOLL. All right.

Let me go back to what I was going to say to begin with.

You did, in questioning of the district attorney, you equated the detention center with a jail, and I would like to hit that one, because I do not think that that ought to be true, or is true in many cases. I do not think it was true at the time that I sat in the Connecticut Juvenile Court, and that is 18 years.

We had a small, 18 bed detention center, and we even had kids that would do things to get into it, rather than to get out. We also had kids getting out. But it was small, and it had a dedicated staff. Warm kind of atmosphere.

On occasion youngsters would be given parties for their birthdays, because the staff really had a feeling for the youngsters. Now the bigger you get the more impersonal you get and I think of Spofford, which may very well be equated in New York with a jail.

Senator SPECTER. Aside from the party, why should that not be found in a jail?

Judge DRISCOLL. Well, that could be done in a jail. However, the connotation of a jail does not indicate that. One example, in Bridgeport we have a correctional center that is supposed to be the most modern, I remember when it was built, in fact, I was on the penal reform committee, trying to get the commissioner to stop building buildings, and he built this building with great pride

We went to see it. What was it? It was a totally secure facility, with rooms whose doors were closed by a central operating mechanism, bang, bang, bang, and they call it a slammer, it is a slammer. That was it. They had one outlet in each of these rooms; that is, for lights. One light. The light over the toilet. It was, you know, in all of its aspects, except one room, they had one room for so-called recreation, where they could watch television, and they had a totally enclosed yard, about half the size of this room. I mean the very facility is almost inhuman.

And we had, in Connecticut, the training school, they had a secure facility there. They still do. That too has some of these aspects, but not nearly as bad. Because at least they have rooms, and they can open them individually. It is not one of these centrally controlled.

But, any how, I would just say that detention facilities can be very humane facilities, and I think it depends on the kind of architecture, and the kind of staff, and this is something, it seems to me, that your committee might very well be concerned about, particularly if you do not have enough in Pennsylvania, you might want to find some more there, and with some direction as to how you allow people to go in them.

Well, I do not know how much you want me to go into the decision. The decision itself, it seems to me, did hold this act constitutional, saying it comported fundamental fairness. Basically, it was not punishment.

Senator SPECTER. Judge Driscoll, what I would like to hear is your judgment on this, whether you think this is an appropriate area for the Congress to legislate and provide some national standards.

Judge DRISCOLL. Yes; I do. I was trying to think of how you would do it, and it seems to me one way would be an amendment to the Civil Rights Act.

Senator SPECTER. Do you think Congress has the power under article V of the 14th amendment to legislate in this field?

Judge DRISCOLL. I think so. The Civil Rights Act, it seems to me, gives you the mechanism.

The other way is to do what we have done with status offenders, that is, the carrot and the stick.

You give them money to provide detention facilities and staff of certain standards. And you require that in order for people to be placed in those facilities, they have certain standards.

Senator SPECTER. Judge Driscoll, at least for the moment today, the carrot is gone.

Judge DRISCOLL. No money. I was afraid you would say that.

But on the other hand I think that the——

Senator SPECTER. That is not totally true. We are going to have a Justice Assistance Act passed and we are going to have some funds. But it is going to be relatively minimal and we are maintaining the Office of Juvenile Justice Delinquency Prevention, extensive funding, that is my prediction. But we are fighting for it out of this subcommittee. But the days of expensive carrots are pretty much gone.

Judge DRISCOLL. Well, one of the things that I understand the Office of Juvenile Justice is already doing is funding training of judges, and I am a past president of the National Council of Juvenile and Family Court Judges so I have been interested in that field because that was the oldest judicial organization engaged in judicial training and a training program for judges on how to make these decisions, what criterion they should use that would be appropriate—to put that in one of the programs under the Juvenile Justice Act.

Senator SPECTER. We have been joined by Mr. Larry Schall, attorney of the Juvenile Law Center, Philadelphia; and Ms. Delores Lee.

Would you step forward at this time, please.

Keep your seat, Judge Driscoll.

We would be pleased to hear from you, Mr. Schall. Your testimony will be made a part of the record. And in accordance with our procedures, we would appreciate it if you would summarize to the extent that you can.

You may proceed, Mr. Schall.

STATEMENT OF LARRY SCHALL, ATTORNEY, JUVENILE LAW CENTER, PHILADELPHIA, PA, ACCOMPANIED BY DELORES LEE, PHILADELPHIA, PA

Mr. SCHALL. Thank you.

I want to thank the Senator for the opportunity to make a brief presentation on a subject which is very much in the news today.

I think my testimony will in large part confirm and support the previous testimony that has been given here, particularly by Ms. Gittis and by Mr. Guggenheim, from what I understand the subject of their testimony was.

Senator SPECTER. Do you believe that there are problems with juvenile detention facilities in Philadelphia where you practice?

Mr. SCHALL. There are clearly problems in Philadelphia.

Senator SPECTER. Will you describe those for us, please.

Mr. SCHALL. Yes.

The facility in Philadelphia where children are detained prior to trial right now is called the Youth Study Center. It is a very large facility housing approximately 120 children.

Senator SPECTER. I know the facility.

Are juveniles admitted there who should not be detained there?

Mr. SCHALL. Yes, juveniles are admitted there who should not be.

Senator SPECTER. Is there a substantial preventive detention practice in Philadelphia County, from your experience?

Mr. SCHALL. Yes, there is substantial preventive detention.

Senator SPECTER. And what kinds of cases are those used for preventive detention?

Mr. SCHALL. Philadelphia is the only county in Pennsylvania which is already governed by a consent decree concerning which children should be detained there. The consent decree is called the Santiago consent decree based out of a lawsuit brought by our office several years ago.

Senator SPECTER. Federal court decision?

Mr. SCHALL. Federal court decision.

Senator SPECTER. Which judge?

Mr. SCHALL. It was Judge Lord, Chief Judge Lord of the Eastern District of Pennsylvania. It never went to trial itself.

Senator SPECTER. Were there standards set forth as to who could be detained there?

Mr. SCHALL. Yes, standards were set forth and those standards were supposed to restrict the children who were being detained there to serious juvenile offenders.

Senator SPECTER. Is it working out badly?

Mr. SCHALL. It has not worked out really. Philadelphia is better than other counties in terms of who they detain, from my perspective. They do limit their detention practices to the serious offender in more instances than in most counties. In most counties in Pennsylvania right now when you look at who is being——

Senator SPECTER. Could you be specific in what kinds of cases there is preventative detention where in your judgment there should not be?

Mr. SCHALL. When we have children who do not need to be detained because of, just as in Ms. Lee's case, there is a family to which the child could be sent home prior to trial, children who are first-time offenders, who have not been adjudicated delinquent on any serious crimes before.

Senator SPECTER. Are many first offenders subject to preventative detention in Philadelphia?

Mr. SCHALL. Yes, and statewide as well.

Senator SPECTER. Was Ms. Lee's case a first-time offender as well?

Mr. SCHALL. He had been arrested before, but never been adjudicated delinquent.

Senator SPECTER. Perhaps we could hear from Ms. Delores Lee who I understand is here to tell us about a specific occurrence with her child.

Ms. Lee, may we turn to you and ask you for your own experience with the preventative detention system in Philadelphia?

STATEMENT OF DELORES LEE

Ms. LEE. Thank you, Senator Specter.

I wanted you to see my specific case from a mother's perspective in that it seemed with this case, which happened 3 years ago, my child was treated like many others—just arbitrarily treated, justice ostensibly passed upon him and the parent has nothing to do with it.

First of all, I would like to preface my statement. I am not talking about an angel, my son is an ordinary, at that time 16, almost 17-year-old child, redblooded, subject to every other thing any other kids are subject to. He did have a prior contact with the police—he

was arrested and given a consent decree. And once he was off that, nothing else happened. And no one ever asked about the specifics of that first case but just said, obviously he is a criminal.

I think that is the wrong way to look at it. My child was a double victim in that particular case. He did not set out to rob anybody. He was being robbed in school. There was nothing I could do. The school district would not deal with me. The only administrator I met at the school was the principal until he got in trouble after the fact, the horse was out of the barn.

All right, he was put on this consent decree and the judge did not want to do that but he did, he had to do it according to the law, according to the prosecutor.

After that, he was arrested a few months later in Montgomery County on the other side of Cheltenham Avenue in Montgomery County, PA, which is a self-contained neighborhood community and was placed under arrest. I received a call from a police officer or detective saying Mrs. Coleman, we have your son incarcerated. I said I am on my way down. He said—Do not worry about it, we are keeping him here tonight, you can see him in the morning.

I got up in the morning and I called and found out where he was, I went there. The judge was there, the witness was there, and I do not know if it is an arraignment or whatever because I did not know about the juvenile justice system. Whatever it was, it was the first hearing.

I felt my child would be allowed to come home with me. They did the whole judicial process there. The public defender—the ostensible public defender who said nothing at all, the conversation and the process was carried out by the judge, the prosecutor, the D.A., the witness and there was another child involved. We were called, summoned to watch, it was like watching a public hanging. The judge never said a word to us, he never consulted us as to what might happen to our child, what was going to happen to our child.

The process of justice was carried out and performed and then my mother jumped up, she said: Are you not going to say anything? Cannot we take the kid home? We are able to take care of him. The judge said:

No, he should have thought about that before he got in troubles.

Senator SPECTER. Was there a public defender present?

Ms. LEE. There was a public defender present.

Senator SPECTER. Did the public defender try to speak?

Ms. LEE. He did not say anything, Senator. He was just there for show to say that due process had been done, which it had not.

Senator SPECTER. He was not competent, in your opinion, representing the interest of your son?

Ms. LEE. No, sir, not at all.

Senator SPECTER. What was the charge against your boy?

Ms. LEE. Well, the charge, OK, stolen car. He and another young man allegedly stole another car and the charges were that he hit a policewoman trying to get away.

Senator SPECTER. Was he later tried, was there a later hearing in juvenile court on this charge?

Ms. LEE. A hearing?

Senator SPECTER. Was there later a hearing?

Ms. LEE. Yes.

Senator SPECTER. Was he adjudicated a delinquent?

Ms. LEE. No, he was not. My son was not. My son was not. The other child was—we feel like he got dumped on. I had a very good attorney that came out of Mr. Schall's office and I had a few connections because I could not afford an attorney. And it was obvious that the public defender was not going to do anything.

Senator SPECTER. Was your son not adjudicated a delinquent?

Ms. LEE. No, and that was the only way I was able to get him off of the streets of Philadelphia.

Senator SPECTER. What prior contact had your son had with the law?

Ms. LEE. As I mentioned before, he had been arrested when he was 16 for the possession of a gun.

Senator SPECTER. He did not have a gun with him when he was arrested on the automobile charge?

Ms. LEE Oh, no, sir.

Senator SPECTER. And what happened to him on his prior contact with the law?

Ms. LEE. The judge was benevolent, he looked at our situation and he did not want to charge him with anything but because the law states that possessing a gun is serious, he had to have something, so he put him on a consent decree for 6 months, nonreporting.

Senator SPECTER. He was charged with possession of a gun, he went to a hearing in Philadelphia?

Ms. LEE. Yes.

Senator SPECTER. Juvenile court, and he had a consent decree nonreporting for 6 months?

Ms. LEE. Yes.

Senator SPECTER. And how long after that was he involved in this Montgomery County incident?

Ms. LEE. I believe it was—I do not know whether it was after the—I think it was after the decree.

Senator SPECTER. He was acquitted in Montgomery County?

Ms. LEE. Yes.

Senator SPECTER. Your complaint is that he was held in detention?

Ms. LEE. Yes.

Senator SPECTER. How long was he held in detention?

Ms. LEE. He was held approximately—anywhere between 16 to 20 days and no notice was given when he was released. They just sent a letter, come and pick him up, he is free.

Senator SPECTER. That was between the time that he was arrested and the time he had his hearing where he was acquitted?

Ms. LEE. Yes.

Senator SPECTER. And did you make any effort during that time to get him out of detention?

Ms. LEE. Oh, yes, I did. And the judge flatly refused. I made the effort through my attorney.

Senator SPECTER. What were the kinds of detention; what kind of a detention facility was he kept in in Montgomery County?

Ms. LEE. All I know it was a detention facility.

Senator SPECTER. Was it bad?

Ms. LEE. It did not look bad, but complained and I am saying it was bad because it was a detention facility.

Senator SPECTER. How old is your son now?

Ms. LEE My son is 21 years old.

Senator SPECTER. Did he suffer as a result of that detention?

Ms. LEE. I believe, yes, and he is very bitter, he feels like things have happened to him one at a time because it was a vicious circle. I believe the same thing, very much so, sir, and I believe it should be the law—the law should be made, the Congress, whoever your decisionmakers are, should make a law to see that these—that some of these children—are not arbitrarily thrown in the can and no consultation with their parents or anyone else until they feel like throwing them away, because it just makes them bitter. And if and when they do grow up, you have got a bitter, nonunderstanding person on your hands who will be dealing further with the justice system.

Senator SPECTER. Mr. Schall, do you think that there is some legitimate room for pretrial detention to enter our juvenile court system?

Mr. SCHALL. Yes, I do, Senator. I think that standards can be developed and have been developed in certain areas which limit pretrial detention to detention that fits the purposes.

Senator SPECTER. Do you think there is some legitimate area?

Mr. SCHALL. Yes, I do, Senator.

Senator SPECTER. Do you think that Congress should legislate in the wake of a decision on *Schall* v. *Martin* to establish some standards?

Mr. SCHALL. I do think so.

I think one of the things which needs to be understood is that detention practices across the country vary greatly, and in Pennsylvania, which has 67 counties, the detention practices in each of those counties varies greatly. I think there needs to be some uniform treatment both within States and across the country.

Senator SPECTER. Thank you very much for coming today.

Our final witness is Mr. Eric Warner, bureau chief, Juvenile Offense Bureau, Bronx, NY.

Mr. Warner, we very much appreciate your joining us. Your full remarks will be made a part of the record, and we are interested in your experience as chief, Juvenile Offense Bureau for 7 years, Bronx district attorney for 14 years.

I note you have a master's degree from New York University and you are a graduate of Albany Law School. What I would like you to center in on, if you would, would be your sense as to whether the Supreme Court, in *Schall* v. *Martin,* was wise in reversing the court of appeals for the second circuit.

STATEMENT OF ERIC WARNER, CHIEF, JUVENILE OFFENSE BUREAU, OFFICE OF THE BRONX DISTRICT ATTORNEY, BRONX, NY

Mr. WARNER. I appreciate the opportunity to be here today, Senator, and I would like to start off by emphasizing that neither I nor the Bronx district attorney, Mario Merola, comes here, or is repre-

sented here as a champion of preventative detention. I do not think that, generally speaking, I am comfortable with that concept.

Senator SPECTER. Do you think preventative detention has any role at all as applied to juvenile offenders, or those charged with juvenile offenses?

Mr. WARNER. Oh, yes, sir, and as a matter of fact, to answer your specific question, I do support the decision in *Schall* v. *Martin.*

I am just trying to say to you that I come here in a context of one who ordinarily does not feel comfortable in preventative detention, but in the context, and for the reasons that we will discuss under the *Schall* decision, I do support that decision.

First of all, I think that we have to make clear the fact that in New York, juveniles are not all the same, that is, not every juvenile who is defined as a person between the ages of 7 and 16 is going to go to the family court to be tried as a juvenile delinquent.

A number of juveniles, called juvenile offenders, are held criminally responsible for their conduct, and they begin in the criminal courts. This class of juvenile is subject to all of the procedures outlined in the adult criminal courts, as including bail.

Senator SPECTER. Do you mean juveniles who are charged with serious offenses and are tried as adults?

Mr. WARNER. Yes, juveniles aged 13, who are charged with murder, juveniles 14 and 15 who are charged with additional serious crimes, such as rape in the first degree, sodomy in the first degree, kidnapping, arson, and so forth.

Senator SPECTER. Armed robbery?

Mr. WARNER. Armed robbery, yes.

Senator SPECTER. May a 13 year old be charged with armed robbery, and tried as an adult?

Mr. WARNER. No, sir, he may not.

Senator SPECTER. But 14 year olds may?

Mr. WARNER. A 14 year old charged with armed robbery can be, and will be charged initially as an adult, subject to removal to the family court.

Senator SPECTER. All right, Mr. Warner, focusing then on juveniles who are in the juvenile court system, are you satisfied with the standards which are applied under New York law for preventative detention?

The focus of our attention here today is whether it would be appropriate for Congress to legislate under the Civil Rights Act, under article V of the 14th amendment, to establish some standards for preventative detention for those who are in the juvenile system, as opposed to 15 or 16 year olds who are certified to be tried as adults.

Mr. WARNER. Senator, the reason that I bring up the dichotomy between juveniles in the New York State system is to illustrate that a juvenile does not suffer, or is not subject to preventative detention for the rules of the family court simply because he is a juvenile. Certain juveniles are syphoned off, and they are taken to the adult system.

It is the juveniles that are left behind that I believe are supposed to be subject to the purposes, the mandates and the principles of the juvenile court. That is, in New York, if there is no longer going to be a rationale for the family court to exist, if it is simply going

to be a compilation of adversarial procedures gleaned from the criminal courts, with a few added benefits of its own, such as privacy of records, t' en all we have is a junior criminal court operating behind closed doors.

So if we are going to maintain the principles behind the family court, if they exist any longer, then what we are talking about is a system in which the family court is directed to a specific purpose, and it is directed toward specific ends, and has specific needs, and certain juveniles who come before it cannot be looked upon simply because they are in an adversarial procedure——

Senator SPECTER. All right. The question is—the threshold question within that juvenile court system, there are some juveniles that ought to be contained within that court system awaiting their trial because they are a danger to the community, or may not appear at trial.

Mr. WARNER. Yes, sir, I think there are.

Senator SPECTER. Do you think that there ought to be more rigorous standards applied nationally than those which are required under the decisions of the Supreme Court of the United States in *Schall* v. *Martin?*

Mr. WARNER. I think one of the points the Supreme Court made, and which the court of appeals in New York State made, was that there has got to be some flexibility in the system, to enable the court to deal with the juvenile that comes before it, and deal with his specific situation.

Senator SPECTER. Had you been sitting on the Supreme Court, given your experience as a lawyer, and your experience in the juvenile field, would you have reversed the decision in the court of appeals for the second circuit?

Mr. WARNER. Yes, sir, and had I been in the district court I would not have decided that way in the first instance.

Senator SPECTER. Why?

Mr. WARNER. Because of the reasons that I am trying to articulate here, and perhaps not succeeding in. Explaining when a juvenile comes before a judge in the New York State system, the law presumes his release. It states that unless the court can set forth one of the two reasons; namely, that he is not likely to appear, or that there is substantial risk that he will commit another crime, they are supposed to let him go. They have to make an affirmative finding before they can actually hold him.

And I think that when a judge looks at an individual who comes before him, he cannot tell in advance, and the legislature cannot tell in advance, what exactly the particular needs of that individual are going to be, and what the needs of society are going to be.

Senator SPECTER. But in *Schall* v. *Martin,* as the facts are related to me, there were offenses such as enticing others to gamble, many were first time offenders and the vast majority were placed on probation, or their cases were dismissed.

There is an appearance at least from what I know, and the purpose of this hearing is to find out more, that the juveniles were not charged with serious offenses, that there was not a likelihood that they would fail to appear, or that they would commit other offenses while at liberty awaiting their hearings.

Mr. WARNER. I might note, Senator, that the one case that I am familiar with is Gregory Martin. Because Gregory Martin was a Bronx case. In fact, Gregory Martin arose as one of the first cases under my Bureau's existence, which was formed after the legislature in 1976 passed the Juvenile Justice Reform Act, which went into effect in 1977, making certain serious crimes in family court a designated felony act.

Gregory Martin was charged with armed robbery, I believe with a knife, in 1977. Ultimately the case was handled by another office on appeal under a system then existing, but that case, I believe, was serious, and I believe that the family court does encounter a number of serious instances in which they have to have the power to deal flexibly, but reasonably, with the individual before them.

Senator SPECTER. And you believe that the standards, applicable under the New York statute, are adequate?

Mr. WARNER. Senator, I think there are people who are going to say that there are no standards under that statute. But I think that is not true. I think the standard is whether there is a serious risk that he is likely to commit a crime. This standard is to be enforced by judges whom I presume people will trust because I hear much talk about how family court judges are capable of doing a number of different things. That is usually raised in the context when people want to transfer the jurisdiction of the criminal court back to the family court.

But when people are talking about this issue, they suddenly forget the arguments they have made in favor of the family court judges to deal with juveniles before them reasonably.

Now, when the juvenile comes before a judge, I think there is also a feeling that the judge is likely to hold him. Well, if that is true, it has not been my experience, because most of the judges in family court that I have encountered are more likely to release him. So I am not finding the abuse that seems to be an undercurrent here in this entire discussion.

I think people are suspicious of what the court will do. They distrust it, and they look to the very brief sentence under the statutory provision 320.5(3)(6), and they say that it does not set forth a standard, but I believe that a standard is set forth. The judge, who we have been told has the ability to look at juveniles and recall seeing them before, and deal with their problems, they can look, and they can determine whether or not there is a serious risk that this individual is going to commit a crime.

And also, we have to remember that these cases in family court are supposed to be resolved very quickly. I think that the goal of a family court is to deal equally with the public's need for protection, and the juvenile's need to have the court act with respect to his best interest, and one of his best interests is not to go back out and commit another crime, for many reasons, not the least of which is the possibility of physical harm or death to him, when he does it.

Senator SPECTER. So your view is that it is not necessary to have any action by the Congress in establishing standards for pretrial detention in juvenile cases?

Mr. WARNER. Senator, if the list of standards is flexible enough to give the court room to take cognizance of situations that are not contemplated before the legislature, then yes, guidelines are always

helpful, but I think if we try to formulate something rigid, which a court is going to be locked into, I know as a prosecutor, I am sure you do, sir, that when legislators enact mandatory sentencing provisions and rules such as that, they are telling the people in the system that they do not trust them, that they do not believe they will do the right thing.

So I do not want to see people like me, and other people that I believe can act properly, being told they do not know what they are doing, and cannot act reasonably. But I think that guidelines, by which the legislature indicates those factors which it thinks is appropriate is always helpful, although it seems to me that in New York State, the New York Legislature should be the one acting.

Senator SPECTER. Well, section 320.5 has the standard substantial probability that he will not appear in court on a return date, or a serious risk, that he may, before the return date, commit an act which if committed by an adult would constitute a crime.

Professor Guggenheim, your basic input is that—is Professor Guggenheim still here?

Mr. WARNER. No, sir.

Senator SPECTER. Ms. Gittis, is it your point that these standards were not applied to really serious cases?

Ms. GITTIS. Could you repeat the question?

Senator SPECTER. The question is, looking at the New York act, a substantial probability that he will not appear on the return date, or serious risk that he may, before the return date, commit an act, which if committed by an adult, would constitute a crime, that those standards are not being appropriately applied by the New York juvenile judges?

Ms. GITTIS. I would point out that risk cannot be appropriately assessed without any guidelines whatsoever——

Senator SPECTER. Do you think there is any necessity for further deliberation on the serious risk that he may commit a crime?

Ms. GITTIS. I think there definitely is.

Senator SPECTER. What do you think about that, Mr. Warner?

Mr. WARNER. Senator, here again, what I frequently hear in this connection is that there is no ability to predict anything.

Well, then we are going to be throwing out the bail system along with it, because that is a prediction. In fact, a court is often called upon to make predictions throughout a case. I do not consider that to be a vaild objection to detaining a juvenile whom the evidence indicates is a serious risk to commit additional crimes while awaiting trial, especially since the statute generally authorizes only a brief period of pre-trial detention.

Senator SPECTER. So you think the standard is adequate?

Mr. WARNER. I think that it is broad and flexible. Of course, if it is applied arbitrarily, it is no good, but that is true of every standard.

I think if we try to get rigid about it, we are going to end up defining out of existence a number of situations.

Senator SPECTER. Thank you very much, Mr. Warner.

Thank you very much, ladies and gentlemen.

I appreciate your being here.

[Whereupon, at 11 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

[The prepared statement of Mr. Warner follows:]

Prepared Statement of Eric Warner

Members of the Subcommittee:

I do not come before you as a champion of "preventive detention." In fact, neither Bronx District Attorney Mario Merola nor I is generally comfortable with that concept. For the reasons that follow, however, we support the Supreme Court decision in Schall v. Martin, which upheld a provision of the New York Family Court Act authorizing pre-trial detention of a youth charged as a juvenile delinquent when there is a serious risk that he may commit criminal acts before his case is finally resolved.

Initially, it must be understood that New York State, for purposes of criminal prosecution, does not treat all juveniles the same. Rather, it requires that certain older juveniles charged with the most serious crimes be prosecuted initially in the criminal courts subject to removal to the family court. These individuals are called "juvenile offenders." All other juveniles, as well as those "offenders" whose cases have been removed, are treated in family court as juvenile delinquents.

Since "juvenile offenders" are now subject to prosecution in the criminal courts, such individuals are also subject to the substantive and procedural rules of the criminal law.

These include the right to a trial by jury, the right to have a grand jury consider the merits of the charge, and the availability of eight different forms of bail, in addition to recognizance, depending upon the circumstances of the case. Quite significantly, on the other hand, under the Family Court Act the concept of bail for juvenile delinquents is totally unknown. In fact, regardless of the circumstances of the case, the statutory rule with respect to release of a juvenile is always the same, and such release is always presumed. Thus, unless the court makes an affirmative finding, either that there is a substantial probability that the juvenile will not appear in court on the return date, or that there is a serious risk that he will commit additional crimes before the return date, the respondent must be released. Notably, the court must state on the record the facts and reasons for ordering detention, but need say nothing at all if the juvenile is released.

In light of this fact, it does not seem at all appropriate to require the family court to ignore a clear showing that a juvenile is likely to commit additional crimes if released, and then to release such individual from the custody of the state to one who is unable or unwilling to prevent the occurrence of additional criminal conduct. To require the court to act in such cavalier disregard of the

obvious, is to require it to disregard the founding principle and mandate which underpins the family court's very existence: namely, to consider at all times the needs and best interests of the juvenile and the community's need for protection. As the New York State Court of Appeals found when it upheld the validity of the predecessor of the current statute:

> "The children who come before Family Court fall largely into two categories -- those who are no longer subject to the guidance or effective control of their parents or guardians, and those who have no custodians at all. Indeed this is what has contributed to their difficulties. In this circumstance to a very real extent Family Court must exercise a substitute parental control for which there can be no particularized criteria."...
>
> "This case draws attention to what appears to be a growing tragedy -- the thus far elusive and largely unmanageable problem of the neglected and delinquent child in our society. Most important -- intelligent, effective and compassionate means must be found to assist children that are not subject to parental guidance or control, or whose custodians are ineffectual, through the temptations and turbulence of adolescence. In this aspect the children are the victims. On the other hand, if they are victims it must also be acknowledged that they are the perpetrators -- of homicides, robberies, burglaries and rapes which threaten to make the modern city an imprisoning fortress for the old, the weak and the timid."

There are some, of course, who reject the parens patria concept, who despite the view that detention for any duration can be in the juvenile's best interests, and who maintain that the family court system functions in everyone's best interests only to the extent that it provides the juvenile with numerous

procedural benefits offered by the criminal courts, as well as with certain other benefits unique to itself. I disagree. I believe that if the family court system is to constitute anything more than a junior criminal court operating behind closed doors, it must have the ability to carry out its special purpose. Furthermore, I agree with the Supreme Court and with the New York Court of Appeals that detention, even in the preventive sense, provides benefits to society, and to the juvenile as well. With respect to the societal benefit, the New York Court stated:

> "Our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with a crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult. It serves to refer to the common recognition of the high school "lark", or to the relative indifference which the young attach, for instance, to shoplifting or to "borrowing" an automobile and the unconcern with which they view the possibility of being apprehended. There is the element of gamesmanship and the excitement of "getting away" with something and the powerful inducement of peer pressures. All of these commonly acknowledged factors make the commission of criminal conduct on the part of juveniles in general more likely than in the case of adults. Antisocial behavior of the young may be dismissed, or even be expected, as a "prank", a characterization never applied to similar conduct of an adult. In conse-

> quence of these and other like considerations, protection of the public peace and general welfare justifies resort to special procedures designed to prevent the commission of further criminal acts on the part of juveniles as differentiated from adults."

Moreover, when crime is avoided, the juvenile himself benefits by avoiding the consequences of his criminal activity, such as physical injury which may be suffered when an outraged victim fights back or when a policeman makes an arrest. Additionally, he avoids the downward spiral of criminal activity into which peer pressure may lead him.

Some still argue that, even assuming that preventive detention may provide certain benefits when utilized properly it is, all too often, improperly utilized. However, I agree with the Supreme Court and the New York Court of Appeals that the validity of this argument has not been established by statistics. Moreover, in my own experience I have not seen a misuse of pre-trial detention. On the contrary, most family court judges whom I have encountered are far more likely to release a juvenile than to detain him.

Once again, by way of conclusion, I reiterate that I am not generally a proponent of preventive detention. However, if there is in fact a legitimate basis for treating juveniles differently from adults with respect to length of sentence, openness of courts, privacy of records and presumption toward

release, then we must recognize that there may also be a legitimate difference in our reasons for detaining them when the record reveals that release is not in the best interests of society or the particular juvenile involved. As long as the judge does not act arbitrarily in this respect, I support the power to make that decision.

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